

NO. 36356-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

vs.

TYSON JOHN CHRISTOFFERSON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. 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 sentencing enhancement 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 violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it imposes a sentencing enhancement 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

On February 24, 2006, agents of the Clark County Drug Task Force, in conjunction with officer's of the Department of Corrections, served a search warrant at 1016 N.E. 63rd Street, Apt. 4 in Vancouver. RP 38-40. This apartment is a small, two bedroom townhouse and is leased by Josie Brown. RP 162. Upon entering the officers went upstairs to the master bedroom, where they found the defendant standing in the middle of the room. RP 79. They immediately arrested him on a probation violation and placed him in handcuffs. *Id.* During a quick patdown, the officer found a small folding knife in the defendant's pocket. Inside the master bedroom the officers found a baggie with about three ounces of methamphetamine in it, along with two sets of scales and packaging materials. RP 44, 62-65, 82-84. However, while the officers found nothing in the bedroom belonging to the defendant, they did find three documents written to and by other people. RP 286-289.

Downstairs the officers found a buy and owe sheet sitting on the coffee table showing amounts of money owed by different people for various amounts of drugs. RP 175-179. The officer's also found a small duffle type bag belonging to the defendant. RP 53-54. After questioning the defendant at the apartment, one of the officer's took the defendant, still

in handcuffs, to the Clark County Jail for booking on both a probation violation as well as on a new charge of possession of methamphetamine with intent to deliver for the methamphetamine found in the master bedroom. RP 126-129. During a routine booking search, a jail officer found a baggie with a very small amount of methamphetamine in the defendant's front pocket. *Id.*

By information filed March 1, 2006, the Clark County Prosecutor charged the defendant with one count of possession of methamphetamine with intent to deliver for the drugs found in the master bedroom of the apartment and one count of possession of methamphetamine for the drugs found during the booking search. CP 1-2. The state also alleged that the defendant committed the first offense while armed with a deadly weapon because he had the small knife in his pocket when he was arrested. *Id.* Two months later the state amended this information to add allegations that the defendant committed count I within 1000 feet of a school bus stop, that he had committed count I "shortly after being released from incarceration," and that he committed count II "while in a county jail." CP 3-4. Four months after this, the state filed a second amended information adding a charge of bail jump based upon the defendant's failure to appear in court for a previously set review hearing. CP 7-8.

The case eventually came to trial with the state calling eleven

different witnesses, and the defense calling three, including the defendant. CP 38-344. Following instruction by the court and argument by counsel, the jury retired for deliberations. CP 27-54, RP 344-392. The jury later returned verdicts of “not guilty” on count I and “guilty” on count II. CP 55-59. The jury also returned special verdicts that the defendant had committed count I shortly after having been released from incarceration and “while in a jail.” CP 60-61. Over objection by the defense, the court later sentenced the defendant within the standard range, which included a 12 month enhancement for having committed count I “while in a county jail.” CP 79-85, 101-120. The judgment and sentence also included the following community custody condition, among others:

- ☒ 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 108.

Following imposition of sentence, the defendant thereafter filed timely notice of appeal. CP 121.

ARGUMENT

I. 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 ADDED A SENTENCING ENHANCEMENT 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. Under this same constitutional guarantee the state must also prove all sentencing enhancements beyond a reasonable doubt except the fact of prior convictions. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Jones*, 159 Wn.2d 231, 149 P.3d 646 (2006).

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).

In the case at bar the trial court added 12 months to the defendant’s sentence under RCW 9.94A.533(5). This provision states:

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the

offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

RCW 9.94A.533(5).

This statute does not provide a definition for the phrase “if the offender . . . committed the offense while in a county jail.” In the case at bar, the defense argued that this phrase should be interpreted to preclude liability when a defendant in possession of a controlled substance was involuntarily transported within the perimeter of a county jail because the defendant has not committed an “actus reus.” The defense proposed this interpretation under the argument that the state’s interpretation rendered the enhancement violative of due process because it eliminated the requirement of an *actus reus*. In making this argument, the defense invoked one of the principle maxims of statutory construction, which is the rule that courts should interpret legislative enactments so that the statute in question does not violate

the constitution. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993).

As the following explains, the defendant's argument was correct.

Common law principles of criminal liability imposed two requirements for culpability: an *actus reus* and *mens rea*. *Carter v. United States*, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); *City of Seattle v. Hill*, 72 Wn.2d 786, 794, 435 P.2d 692 (1967) (criminal liability requires volitional conduct); *State v. Lindberg*, 125 Wash. 51, 215 Pac. 41 (1923) (strict liability, or *mala prohibita*, crimes comport with due process so long as one acts voluntarily).

In *State v. Utter*, 4 Wn.App. 137, 479 P.2d 946 (1971), the court explained these two components of criminal liability in the context of a defendant who appealed his manslaughter conviction for stabbing his son to death, arguing that the trial court had erred when it refused to allow the defense to argue that the defendant had not committed the "act" of killing, as was required under the statute, because he had stabbed his son while in an "automatic or unconscious state" arising from his training and combat experiences in World War II. In other words, the defendant argued that his actions involved no *actus reus*. In addressing this claim, the court noted the following concerning the requirement of an *actus reus* for the application of criminal liability:

There are two components of every crime. One is objective—the

actus reus; the other subjective—the *mens rea*. The *actus reus* is the culpable act itself, the *mens rea* is the criminal intent with which one performs the criminal act. However, the *mens rea* does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the *actus reus* itself. This is the element of volition.

State v. Utter, 4 Wn. App. at 139, 479 P.2d 946 (1971).

In further explaining this concept, the court quoted the following from Perkins on Criminal Law:

It is sometimes said that no crime has been committed unless the harmful result was brought about by a 'voluntary act.' Analysis of such a statement will disclose, however, that as so used the phrase 'voluntary act' means no more than the mere word 'act.' An act must be a willed movement or the omission of a possible and legally-required performance. This is essential to the *Actus reus* rather than to the *mens rea*. 'A spasm is not an act.'

Perkins, *Criminal Law*, page 660 (1957) (footnotes omitted) (cited in *State v. Utter*, 4 Wn.App. at 140).

The court then noted the following from Wharton's Criminal Law:

The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.

Anderson, 1 Wharton's Criminal Law and Procedure § 50 (1957) (as cited in *State v. Utter*, 4 Wn.App. at 142). The court in *Utter* then cited to the following cases and treatises for support of this proposition: *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969); *People v. Wilson*, 66 Cal.2d 749, 59 Cal.Rptr. 156, 427 P.2d 820 (1967); *People v. Anderson*, 63 Cal.2d 351, 46

Cal.Rptr. 763, 406 P.2d 43 (1965); *Watkins v. Commonwealth*, 378 S.W.2d 614 (Ky.1964); *Carter v. State*, 376 P.2d 351 (Okl.Cr.1962); *People v. Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959); *Corder v. Commonwealth*, 278 S.W.2d 77 (Ky.1955); *People v. Baker*, 42 Cal.2d 550, 268 P.2d 705 (1954); *Smith v. Commonwealth*, 268 S.W.2d 937 (Ky.1954); *Fain v. Commonwealth*, 78 Ky. 183, 39 Am.Rep. 213 (1879); 22 C.J.S. Criminal Law § 55 (1961); 21 Am.Jr.2d, Criminal Law § 29 (1965).

The decision in *Martin v. State*, 31 Ala.App., 17 S.2d 427 (1944), is perhaps one of the most oft-cited and well-known decisions on the subject of *actus reus*. See *People v. Gastello*, 57 Cal.Rptr.3d 293, 297, — P.3d — (2007) (“*Martin* is a criminal-law classic on the subject of *actus reus* and is a favorite of casebooks and law review articles.”). In this case police officers arrested the defendant who was in his home at the time and drunk. The officers then took the defendant to a public highway, where he “manifested a drunken condition by using loud and profane language.” The state later convicted the defendant of violating a criminal statute that made it illegal for a person who was intoxicated or drunk to “appear” in any public place where one or more persons are present and then “manifest a drunken condition by using loud and profane language.” The defendant appealed, arguing that he did not commit the *actus reus* of the offense because he did not voluntarily “appear” in a public place; the police forced him to do so. The appellate

court agreed and reversed, holding as follows:

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.

Martin v. State, 31 Ala.App. at 335 (cited in

While there are apparently no Washington decisions on what constitutes the *actus reus* for the sentencing enhancement under RCW 9.94A.533(5), there are a number of recent decisions out of other jurisdictions finding that one who is involuntarily taken to a jail while in possession of illegal drugs has not committed the *actus reus* of possessing the drugs in the jail. For example, in *State v. Tippetts*, 180 Or.App. 350, 43 P.3d 455 (2002), the defendant was arrested at his home following the execution of a search warrant. He was taken to the Washington County Jail where he was turned over to the custody of a corrections officer who searched the defendant and found marijuana in his pants pocket. Based upon this fact, the State later convicted the defendant under ORS 162.185, which makes it a crime to “knowingly possess” drugs while “being confined in a correctional facility.”

On appeal, the defendant argued that proof of a voluntary act was a “necessary prerequisite to proving criminal liability and that he did not voluntarily introduce marijuana into the jail.” In making this argument the

defendant relied upon ORS 161.095(1), which codifies the common law requirement of an *actus reus*. This statute states:

The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.

ORS 161.095(1).

Based upon this statute, which the court recognized as a codification of the common law requirement of an *actus reus*, the court reversed the conviction, holding as follows:

The commentary to the Model Penal Code makes clear that the mere fact that defendant voluntarily possessed the drugs before he was arrested is insufficient to hold him criminally liable for the later act of introducing the drugs into the jail. Rather, to satisfy ORS 161.095(1), the involuntary act must, at a minimum, be a reasonably foreseeable or likely consequence of the voluntary act on which the state seeks to base criminal liability. See American Law Institute, Model Penal Code §2.01, 120 (Tentative Draft No. 4 1955); *State v. Gooze*, 14 N.J. Super. 277, 81 A2d 811, 816 (1951) (cited in the commentary to the Model Penal Code). On these facts, no reasonable juror could find that the introduction of contraband into the jail was a reasonably foreseeable consequence of possessing it. Moreover, the state does not dispute that, in this case, the police's act of arresting defendant and transporting him to the jail was an intervening cause that resulted in the marijuana's being introduced into the jail. The state's alternative argument provides no basis for upholding the trial court's ruling.

State v. Tippetts, 180 Or.App. at 354 (footnote omitted).

Following *Tippetts*, the Oregon Court of Appeals consistently reversed convictions for defendants who were charged with supplying

contraband when they were taken to a jail involuntarily while under a lawful arrest and found to have drugs on their person. See *State v. Gotchall*, 180 Or.App. 458, 43 P.3d 1121 (2002); *State v. Becker*, 187 Or.App. 274, 66 P.3d 584 (2003); *State v. Delaney*, 187 Or.App. 717, 71 P.3d 93 (2003); *State v. Gonzales*, 188 Or.App. 430, 71 P.3d 573 (2003); *State v. Getzinger*, 189 Or.App. 431, 76 P.3d 148 (2003); *State v. Thaxton*, 190 Or.App. 351, 79 P.3d 897 (2003); *State v. Ortiz-Valdez*, 190 Or.App. 511, 79 P.3d 371 (2003).

The State of California also follows this holding that one who is arrested while in possession of drugs does not commit the *actus reus* of possessing those drugs in a jail when they are discovered during the booking process at jail. For example, in *People v. Gastello*, *supra*, the defendant appealed his conviction for bringing drugs into a county jail, arguing that he had not committed the *actus reus* of the offense because his appearance at the jail was involuntary since the police had arrested him and taken him to the jail while he happened to be in possession of drugs.

In addressing the defendant's claims, the court first noted that the commission of an *actus reus*, an affirmative act, was one of the fundamental requirements of criminal liability under the common law, and was also a statutory requirement under California law. The court then noted that the *actus reus* or affirmative act of the crime charges was to "bring drugs into the jail." The court then addressed whether the defendant had committed this

affirmative act. The court held:

From the time of his detention during the traffic stop to the time when the drugs were discovered, defendant did nothing that can be regarded as the affirmative act of bringing something into a jail. He was detained, questioned, arrested, handcuffed, transported to the jail grounds and led into the jail building. He *omitted* to confess to having the drugs, but that is not an affirmative act. Defendant *did* nothing but submit to the lawful authority of the police. In sum, defendant did not bring drugs into the jail. The facts can best be described by the statement that defendant *was brought* to the jail while *not confessing* that he had drugs on his person. This statement describes passivity and omission, not the doing of an act. He possessed the drugs, of course, and that is an affirmative act for purposes of the crime of simple possession. Defendant does not challenge his conviction of simple possession. The conviction he does contest requires a different act, “bringing” or “sending.” (Pen. Code, § 4573.)

People v. Castello, 57 Cal.Rptr. at 296-297 (italics in original).

In *Castello*, the court made this statement and then reviewed the decision *Martin v. State*, *supra*, and its application of the *actus reus* requirement. Based upon this decision the court reversed the defendant’s conviction, holding as follows:

Martin at least did the affirmative act of yelling profanities after being arrested and brought into the street. Here defendant did nothing at all after police officers took custody of him; he omitted to confessing to having drugs and submitted to being taken to prison. For these reasons, the evidence did not support the essential element of *actus reus*. The prosecution did not present sufficient evidence to prove the crime.

People v. Castello, 57 Cal.Rptr. at 296-297 (citing *State v. Tippetts*, *supra*).

The state of New Mexico follows this rule for persons involuntarily

taken to jail while in possession of drugs. *New Mexico v. Cole*, 2007 N.M.C.A. 99, 164 P.3d 1024 (2007) (defendant who was arrested while in possession of a controlled substance and booked into jail not guilty of “carrying contraband into the confines of a county or municipal jail” because he did not commit the *actus reus* of the offense even though he could have told the police that he had the drugs). The state of Ohio also follows this rule for persons involuntarily taken to jail while in possession of drugs. *State v. Sowry*, 155 Ohio App. 3d 742, 803 N.E.2d 867 (2004) (defendant’s possession of contraband in a jail was not the result of a voluntary act on his part because officers brought him into the jail under arrest). The state of New York also follows a similar rule for crimes that include a *locus* requirement under circumstances in which the defendant was involuntarily taken to the specific *locus*. *People v. Newton*, 72 Misc.2d 646, 340 N.Y.S.2d 77 (1973) (no *actus reus* to support conviction under New York law for possessing an unlicensed firearm when the defendant’s flight made an unscheduled landing in New York); *People v. Shaughnessy*, 66 Misc.2d 19, 319 N.Y.S.2d 626 (1971) (no *actus reus* to support conviction of trespassing where defendant was a passenger in a car that entered property).

In this case the state may argue that *Tippetts*, *Gastello*, *Cole*, and *Sowry* do not apply in the case at bar because the state’s involved in those cases, Oregon, California, New Mexico, and Ohio respectively, all had

statutes that made an *actus reus* a prerequisite to criminal liability, while Washington does not. While this fact is correct, it is merely a difference without any legal distinction. The reason is that, as recognized by each court in the four cases, the state statutes were merely codifications of the centuries old common law principle that an *actus reus* in conjunction with a *mens rea* were the conditions precedent to criminal liability. *See State v. Bash*, 130 Wn.2d 594, 924 P.2d 978 (1996) (“For several centuries, common law crimes were defined to require both an *actus reus*, or guilty conduct, and a *mens rea*, the culpable state of mind, whether intent, knowledge, recklessness, or, more rarely, negligence”). Additionally, while due process is not necessarily offended by the creation of strict liability offenses requiring no *mens rea*, nothing in those cases suggests that there can be criminal liability without the defendant’s volitional act to constitute the *actus reus*. Rather, as noted by LaFave and Scott in their treatise on criminal law, there can be no crime without an *actus reus*.

An “actus reus,” or act, is an essential element of every crime, because “bad thoughts alone cannot constitute a crime; there must be an act. . . . Thus the common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined. A bodily movement, to qualify as an act forming the basis of criminal liability, must be voluntary.”

Lafave & Scott, *Criminal Law* § 25 (1972); *See Also* Perkins & Boyce, *Criminal Law* 605 (1982) (“Necessity of an Act for the Existence of Any

Crime”); Model Penal Code § 1.13 (2).

In the case at bar, as in *Tippetts*, *Gastello*, *Cole*, and *Sowry* the defendant committed the crime of possession of a controlled substance. The *actus reus* of that offense was volitional act of “possession.” In the case at bar, as in each of those cases, there was no *locus* requirement for the commission of the offense other than a *locus* required within the jurisdictional boundaries of the adjudicating state. In the case at bar, as in *Tippetts*, *Castello*, *Cole*, and *Sowry*, the police involuntarily conveyed the defendant and the drugs he possessed to the confines of a jail, where the drugs were discovered during a routine booking search. Thus, as in *Tippetts*, *Castello*, *Cole*, and *Sowry*, the defendant did not commit the *actus reus* of “being” within the *locus* wherein the crime or enhancement was committed. Put another way, while the defendant in the case at bar and defendant’s in *Tippetts*, *Castello*, *Cole*, and *Sowry* did each volitionally possess drugs, they did not volitionally possess drugs within the *locus* of the jail. Consequently, in the case at bar, as in *Tippetts*, *Castello*, *Cole*, and *Sowry*, the trial court erred when it enhanced the defendant’s sentence because substantial evidence does not support the conclusion that the defendant committed the *actus reus* of the enhancement.

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 108.

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 are 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 paraphrenalia" 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. *Rheurark 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

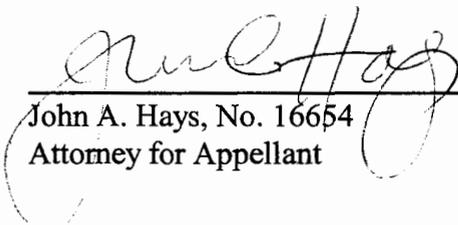
decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to 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

The trial court erred when it imposed a sentencing enhancement unsupported by substantial evidence and when it imposed a community custody condition that was void for vagueness. This court should order both of these provisions stricken from the defendant's sentence.

DATED this 22nd day of October, 2007.

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 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.

RCW 9.94A.533

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements

under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times

shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that

it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one

offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so

that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

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.

COURT OF APPEALS
DIVISION II
07 OCT 24 PM 12:45
STATE OF WASHINGTON
BY gm
DEPUTY

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 TYSON JOHN CHRISTOFFERSON,)
)
 Appellant,)

CLARK CO. NO: 06-1-00425-6
APPEAL NO: 36356-9-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) vs.
 COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the 22ND day of OCTOBER, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

TYSON J. CHRISTOFFERSON #823379
WASH STATE PENITENTIARY
1313 n. 13TH AVE.
WALLA WALLA, WA 99362-1065

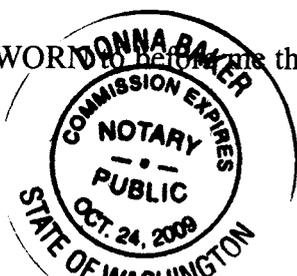
and that said envelope contained the following:

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

DATED this 22ND day of OCTOBER, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 22 day of OCTOBER, 2007.



[Signature]

NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

AFFIDAVIT OF MAILING - 1

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