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DIVISION II

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STATE OF WASHINGTON
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NO. 36558-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODNEY LYNN MORELAND,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it accepted his guilty plea because the defendant did not knowingly, voluntarily and intelligently enter it.

2. The trial court erred when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it accepts a guilty plea when the defendant did not knowingly, voluntarily and intelligently enter it?

2. Does a trial court err if it imposes community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

By amended information filed April 24, 2007, the Clark County Prosecutor charged the defendant Rodney Lynn Moreland with one count each of second degree rape of a child, third degree rape of a child, and witness tampering. CP 13. The information alleged that the first count was committed between June 1, 2005 to November 2, 2006. *Id.* The defendant was then 35-years-old. CP 14. Although he only completed the 10th grade, he had later obtained a GED. CP 38. On the same day that the state filed the amended information, the defendant pled guilty to all of the charges, indicating that he would be seeking a SOSSA sentence. CP 15-32; RP 1-14.

The statement of defendant on plea of guilty that the defendant signed stated that his "Standard Range" on the first count of second degree rape of a child was from 111 to 147 months in prison, and that he would be on community custody for life based upon this conviction. RP 16. The guilty plea did not state that the court would sentence the defendant on Count I under RCW 9.94A.712 to life in prison with a minimum mandatory time to serve equal to the standard range before first being considered for release. RP 15-32. Rather, it stated that the defendant would be subject to sentencing under RCW 9.94A.712 only if he had committed one of a number of offenses listed in a grid on another page of the guilty plea form. RP 17.

During the guilty plea hearing held on April 24, 2007, neither the

court nor the defense attorney informed the defendant that the court would be sentencing him to life in prison on count I under RCW 9.94A.712. RP 1-14. Rather, the court affirmatively told the defendant that he was only facing a maximum of 147 months in custody and “up to” community custody for life.

RP 4. The court’s exact words on this point were as follows:

THE COURT: All right. But, now, based on your criminal history on count [one]¹ you face 111 to 147 months in custody; community custody range of up to life; and the maximum term fine of life and \$50,000.00.

RP 4.

After the court accepted the plea, it put the matter over for sentencing, ordered a presentence investigation report (PSI), and signed an order allowing the defense to obtain a psycho-sexual evaluation at state expense. RP 12 - 14. The defendant later obtained this evaluation from Dr. C. Kirk Johnson of the Vancouver Guidance Clinic. CP 44-53. Neither the Department of Corrections in the PSI nor Dr. Johnson in his evaluation made a claim that the defendant ever drank alcohol, used drugs, or that the defendant had any substance abuse problem at all. *Id.* Additionally, the state made no such claim at any point in time. RP 1-37.

¹The verbatim report actually states “Count Two.” Whether this was a speaking error by the court or a transcription error by the reporting service, the context of the statement reveals that the court was referring to “Count One.”

Prior to sentencing the defendant wrote a number of letters to the court requesting that the court recuse itself from sentencing the defendant and that the court appoint new counsel for him. CP 54-56, 57-60. The defendant's statement in support of the former request was as follows:

I have read in the paper about Diane Woolard, I have heard from several inmates who have had her. Her rulings are often unfair and excessive and she often does not listen to recommendations by specialists in report to the court. She is known to be a Manhater.

CP 54.

The defendant's statement in support of his request for a new attorney claimed the following:

My attorney, Alfred Bennett, has not fought for me at all. You can't even call him from jail, because his office won't accept collect calls. He doesn't respond to letters. He often doesn't read them. On several occasions I have told him things in a letter just to ask me the same questions when he sees me.

He has rarely made visits to see me about this case. He has not told me about all the allegations in the police report, which many were false. I heard about it second hand. He has never talked to me personally about my side of the story - but yet advises me to take a plea and get SOSSA. But when I did - he then tells me SOSSA isn't for sure.

CP 54-55.

At the beginning of the subsequent sentencing hearing, Judge Woolard stated that she had received the defendant's motion that she recuse herself, and she was denying it. RP 17. Although she did not mention that the letters included a motion for a new attorney, the defendant did not orally

renew this motion at the time of sentencing. RP 17-37. After denying the motion to recuse and allowing the defendant his right to allocution, the court noted that both Dr. Johnson in his evaluation and the Department of Corrections in the PSI recommended against a SOSSA sentence. RP 22-53. Based upon these reports, the court refused the defendant's request for sentencing under the SOSSA option. RP 15-37. Rather, the court imposed a sentencing of life in prison on count I under RCW 9.94A.712, with a minimum mandatory time to serve of 147 months before the defendant could first be considered for release. RP 68. The court also imposed community custody for life and included the following community custody conditions, among others:

- ☒ The defendant shall not consume any alcohol.
- ☒ Defendant shall submit to urine, breath, or other screening whenever requested to do so by the treatment program staff and/or the community corrections officer.

CP 69-71.

The court also imposed additional conditions as part of community custody. They included the following:

12. You shall not possess, use, or own any . . . ammunition, or deadly weapon. Your community corrections officer shall determine what those deadly weapons are.
13. You shall not possess or consume alcohol
14. You shall submit to urine, breath, or other screening whenever

requested to do so by the program staff or your community corrections officer.

16. You shall not be in any place where alcoholic beverages are the primary sale item.
17. You shall take antabuse per community corrections officer's direction.
18. You shall attend an evaluation for abuse of drugs, alcohol . . . and successfully complete all phases of any recommended treatment as established by the community corrections officers and/or treatment facility.

CP 84.

Following imposition of sentence, the defendant filed timely notice of appeal. CP 96.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ACCEPTED HIS GUILTY PLEA BECAUSE THE DEFENDANT DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTER IT

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Personal Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not “knowingly” made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

Failure to inform a defendant of direct sentencing consequences upon a plea of guilty is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a “manifest injustice.” A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505

(1991). Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with first degree kidnaping, first degree rape, and second degree assault. The defendant later agreed to plea guilty to a single charge of second degree rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made

constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.

The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

State v. Walsh, 143 Wn.2d at 8-9. *See also State v. Kisse*, 88 Wn.App. 817, 947 P.2d 262 (1997) (mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

In the case at bar, the trial court did not inform the defendant during the guilty plea colloquy that he would be sentenced to life in prison on Count I under RCW 9.94A.712. Rather the court told the defendant that the standard range for this offense was from 111 to 147 months in prison. The

court stated:

THE COURT: All right. But, now, based on your criminal history on count [one]² you face 111 to 147 months in custody; community custody range of up to life; and the maximum term fine of life and \$50,000.00.

RP 4.

In fact, under RCW 9.94A.712, the defendant was subject to a mandatory sentence of life in prison on Count I with a minimum mandatory sentence to serve before consideration for release. Subsection 3 of RCW 9.94A.712 states as follows:

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

RCW 9.94A.712(3).

Under this subsection, a defendant convicted of a Class A felony receives a life sentence with a minimum mandatory term to serve before the Indeterminate Review Sentence Board may consider the person for release. That release, once granted, is always subject to revocation in the future. Although the “minimum term” the court is required to impose must be

²The verbatim report actually states “Count Two.” Whether this was a speaking error by the court or a transcription error by the reporting service, the context of the statement reveals that the court was referring to “Count One.”

somewhere within the “standard sentence range” that the court would have used to calculate the defendant’s determinate sentence had RCW 9.94A.712 not applied, the “minimum term” is not a determinate “standard range sentence.” Rather, the “minimum term” and the “maximum term” constitute an indeterminate sentence, such as those used prior to the enactment of the Sentencing Reform Act. The decision in *State v. Monroe*, 125 Wn. App. 435, 109 P.2d 449 (2005), addresses this distinction.

In *Monroe, supra*, the defendant pled guilty to two counts of first degree rape, one count of first degree burglary with sexual motivation, five counts of first degree kidnaping, and one count of second degree assault. Sentencing under RCW 9.94A.712 applied to both rape charges and the burglary with sexual motivation. In return for the plea, the state agreed to recommend a minimum mandatory term of 511 months on the first three counts, which was the top end of what would have been the standard range had RCW 9.94A.712 not applied. In spite of this recommendation, the court sentenced the defendant to life on each count with a minimum mandatory term of 651 months based upon its finding that the defendant acted with deliberate cruelty upon particularly vulnerable victims and that he acted with a high level of sophistication and planning. The defendant thereafter appealed, arguing that imposition of a minimum mandatory term in excess of the possible top end of the standard range violated his Sixth Amendment

rights as set out in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which was decided after he was sentenced.

The state presented two arguments in response to the defendant's claims: (1) that *Blakely* did not apply to setting the minimum mandatory sentence under the indeterminate sentencing scheme found in RCW 9.94A.712, and (2) if *Blakely* did apply to the setting of the minimum mandatory sentence under RCW 9.94A.712, the trial court did not err because the defendant stipulated to the court's consideration of the probable cause statement and discovery which in turn supported the factual findings the court made in support of the minimum mandatory sentence in excess of the standard range. The court addressed the second argument first and held that the defendant could not be held to a waiver of the rights recognized in *Blakely* because his sentence predated the *Blakely* decision.

The court then went on to address the state's first argument that *Blakely* did not apply to the indeterminate sentencing scheme found in RCW 9.94A.712. All three judges agreed that *Blakely* did not apply to setting the maximum term of confinement because "all facts necessary to support the mandatory maximum term of life were proved by [the defendant's] knowing and voluntary plea and waiver of his right to a jury trial." *State v. Monroe*, 126 Wn.App. at 445. Two of the judges agreed (for different reasons) that *Blakely* did apply to setting a minimum mandatory term that exceeded the

available standard range. Judge Bridgewater disagreed, based upon the difference between “determinate” standard range sentences under the Sentencing Reform Act and “indeterminate” sentences under RCW 9.94A.712. Judge Bridgewater stated:

RCW 9.94A.712 employs a different sentencing structure from the SRA “determinate sentences.” The SRA sets determinate sentences for offenses, using criminal histories and certain additors (permissible consecutive sentences for multiple convictions) to arrive at the standard ranges for the offenses. RCW 9.94A.510, .589. Other factors may add to the potential “period of confinement” (e.g., firearm possession) and then, of course, there is the potential for additional time to be added to the potential period of confinement for aggravating factors (discretionary exceptional sentences based upon prior convictions and exceptional sentences based upon factors that must be proved beyond a reasonable doubt or admitted by the defendant). RCW 9.94A.535, .602. Although the period of confinement can be reduced by “earned release,” the sentence is a “determinate sentence” under the SRA--once the defendant has served the maximum of the determinate sentence, his obligation cannot be extended to the maximum possible under the statute he violated.

State v. Monroe, 125 Wn. App. at 444 (footnote omitted).

After explaining the principles of “determinate sentencing,” Judge Bridgewater went on to examine RCW 9.94A.712 and explain why it constituted an “indeterminate” sentence. The court explained:

RCW 9.94A.712 is distinctly different. First, it concerns a set of crimes that are sexual in nature--e.g., rape in the first or second degree, rape of a child in the first or second degree, etc., and certain crimes that occur with sexual motivation, e.g., murder, kidnaping, assault, etc. RCW 9.94A.712(1)(a)(i)-(ii). For these crimes, the sentencing court is without discretion and there is no sentencing under any grid in the SRA for establishing the maximum sentence

imposed. The sentencing court must sentence to the maximum under the particular statute. Here, no fact increased the maximum imposed by the court, and the threshold for Blakely simply is not met. RCW 9.94A.712(3) mandates only that a minimum term be set by the court using the standard range or exceeding the standard range under RCW 9.94A.535. For this reason, Blakely is not implicated.

In effect, RCW 9.94A.712 changes the sentencing structure to one which is “indeterminate”; this is why the Indeterminate Sentence Review Board (ISRB) is referenced. RCW 9.94A.712(5), (6). Once a defendant is sentenced under RCW 9.94A.712, he or she is subject to the authority of the ISRB up to his or her life term. RCW 9.94A.712(5); RCW 9.95.420(3).

State v. Monroe, 125 Wn.App. at 455-456.

For the purposes of the argument herein, the decision in *Monroe* explains that both the maximum sentence imposed and the minimum mandatory sentence constitute an indeterminate sentencing scheme. That is to say, completion of the minimum mandatory sentence under RCW 9.94A.712 only grants a defendant initial eligibility for release, it does not guarantee release. Similarly, once release is granted, it is subject to revocation for the lifetime of the defendant.

The distinction between determinate and indeterminate sentencing as explained by Judge Bridgewater illustrates why the Statement of Defendant on Plea of Guilty in this place and the guilty plea colloquy failed to properly inform the defendant of the direct consequences of his plea. In the plea form the defendant’s attorney used, paragraph 6(a) tells the defendant that he is facing a “standard range sentence” of 67 to 89 months in prison. Specifically,

section 6(a) states:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

CP 16 (capitals in original).

A table then immediately follows this statement which states that the defendant's "OFFENDER SCORE" is four points, and that both his "STANDARD RANGE ACTUAL CONFINEMENT (not including enhancement)" and "TOTAL ACTUAL CONFINEMENT (standard range including enhancement)" were 111 to 147 months, 31 to 416 months, and 4 to 12 months respectively. CP 16 (capitals in original). By using the term "standard range" three times, the statement of defendant on plea of guilty misleads the defendant into believing that his guilty plea subjects him to a determinate sentence that will not be under 111 months but will not exceed 147 months. Although the prosecutor was present for the colloquy he and the defense attorney stood mute as the court compounded the defense attorney's error in misstating the effect of the defendant's plea on Count I. This error affected the most direct of all circumstances: the maximum time the defendant was facing. Thus, this error entitles the defendant to withdraw his guilty plea.

II. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that

alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In this case the defendant plead guilty to one count each of second and third degree rape of a child RCW 9A.44. Under RCW 9.94A.030(41)(a)(i) the term "sex offense" is defined to include any "felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11)." Thus, the defendant pled guilty to two "sex offenses." The imposition of community custody for sex offense sentences of confinement for one year or more is controlled by RCW 9.94A.715. This statute states in part:

- (1) When a court sentences a person to the custody of the

department for a sex offense not sentenced under RCW 9.94A.712. . . committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. . . .

RCW 9.94A.715(1).

As this statute explicitly states it applies when the court sentences a person “to the custody of the department for a sex offense not sentenced under RCW 9.94A.712.” Thus the trial court in the case at bar had authority to impose community custody. Subsection 2 of this statute states the following concerning the conditions of community custody the trial court may impose:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of the offender’s community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute provides the trial court with authority to impose further conditions. It states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(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.

RCW 9.94A.700(5).

Under these provisions 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). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these 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). The decision in *State v. Combs*, 102 Wn.App. 949, 10 P.3d 1101 (2000), illustrates this point.

In *Combs*, the defendant pled to a charge of child molestation. As part of the judgment and sentence the court ordered the defendant to submit to periodic polygraph examinations in order to monitor his compliance with his conditions of community custody. He then appealed, arguing that the trial court erred when it ordered the polygraph examinations because the order does not state the purpose or limit the subject matter of the examinations. The defendant maintained that under the decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), the scope of the polygraph examination must be limited to the authorized purpose of monitoring his compliance with the court’s order and that it could not be used by the state to search for other criminal violations. In addressing this argument, the court held as follows:

Relying on *Riles*, we conclude that the language of Mr. Combs’s judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present. While not discouraging the use of pre-printed sentencing forms, we want to take this opportunity to strongly encourage the parties to carefully tailor

them to conform to the particular nuances of each case. Here, Mr. Combs's judgment and sentence should have explicitly contained the monitoring compliance language. As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, insure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard.

State v. Combs, 102 Wn.App. at 952-953.

In the case at bar, the specific polygraph language in the judgment and sentence does contain appropriate limiting language where it states that the purpose of the polygraph will be "to ensure compliance with the conditions of community placement/custody." Thus, the court did not err when it imposed this condition by itself. However, this provision must be seen in conjunction with the preceding treatment requirement, wherein the court requires the defendant to "cooperate" with treatment, and then defines the term "cooperate" as "follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity."

The problem with this language is that one of the requirements of sexual deviancy treatment is for the patient to reveal all prior and current deviant sexual thoughts and acts. Thus, a reasonable sexual deviancy treatment provider and a reasonable community corrections officer would interpret these two provisions to require the defendant to reveal all of his prior deviant sexual acts, including those unknown to the state and which will

subject him to further criminal liability. In essence then, these two provisions seen in conjunction to each other will require the defendant to waive his Fifth Amendment right against self-incrimination. To the extent these provisions do require such a waiver, they exceed the court's authority.

In this case, the court imposed the following additional community custody conditions, among others:

- ☒ The defendant shall not consume any alcohol.
- ☒ Defendant shall submit to urine, breath, or other screening whenever requested to do so by the treatment program staff and/or the community corrections officer.

CP 69-71.

The court also imposed supplemental conditions as part of an appendix. These conditions included:

12. You shall not possess, use, or own any . . . ammunition, or deadly weapon. Your community corrections officer shall determine what those deadly weapons are.
13. You shall not possess or consume alcohol
14. You shall submit to urine, breath, or other screening whenever requested to do so by the program staff or your community corrections officer.
16. You shall not be in any place where alcoholic beverages are the primary sale item.
17. You shall take antabuse per community corrections officer's direction.
18. You shall attend an evaluation for abuse of drugs, alcohol . . .

and successfully complete all phases of any recommended treatment as established by the community corrections officers and/or treatment facility.

CP 84.

That portion of part 12 that prohibits the defendant from possessing “deadly weapons” is not only unworkable but invalid. While the court does have authority to prohibit a defendant from possessing firearms, it does not have the authority to prohibit a defendant from possessing “deadly weapons.” Indeed, this term is so ambiguous as to give the defendant’s probation officer blanket authority to prevent the defendant from possessing a steak knife, a bottle of bleach, a motor vehicle, or a razor blade just to name a few items that can qualify as “deadly weapons” depending upon how they are used. The trial court did not have authority to impose this condition. *See e.g., Combs, supra* at 954 (“Although the Sentencing Reform Act of 1981 contains a provision that does not allow a convicted felon to use or possess a firearm and/or ammunition, there is no such provision that allows the court to prohibit the use or possession of any other type of weapon. Accordingly, the court exceeded its authority when this term was included in the sentencing order.)

In addition, the trial court also abused its discretion when it prohibited the defendant from consuming alcohol, when it ordered him to get an evaluation and treatment, when it ordered other alcohol restrictions, and when

it ordered him to take antabuse at the direction of his community corrections. First, the trial court had the option to find that the defendant was chemically dependent and that this dependency “related to” the crimes he committed but the trial court declined to do so. This finding is included on page 2 of the judgment and sentence and is unchecked in this case. CP 64. Indeed, there was no evidence to indicate that alcohol had anything to do with the case at bar. Thus, there is no evidence that the defendant even consumes alcohol, much less that such consumption “relates to” the current offenses. As a result, the trial court abused its discretion when it imposed alcohol related prohibitions and requirements.

Additionally, the requirement that the defendant take “antabuse” at the direction of his community corrections officer is particularly erroneous. The term “antabuse” is a brand name for the prescription drug disulfiram. *See* <http://www.medicinenet.com/disulfiram-oral/article.htm>. Community Corrections Officers are not medical doctors, they do not have the legal authority to prescribe this drug, and they do not have the medical knowledge necessary to determine whether this drug should or should not be used. The legislature specifically recognized this fact under Washington Deferred Prosecution statute found at RCW 10.05.150(7), wherein the legislature states the following:

A deferred prosecution program for alcoholism shall be for a

two-year period and shall include, but not be limited to, the following requirements:

. . .

(7) The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment shall be reserved to the treating facility and the petitioner's physician;

RCW 10.05.150(7).

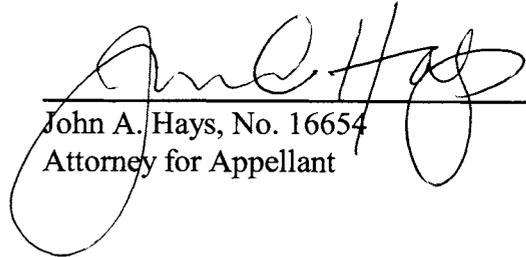
Thus, the trial court abused its discretion when it gave the community corrections officer authority to require the defendant to take antabuse.

CONCLUSION

The defendant is entitled to withdraw his guilty plea because he did not knowingly enter it. In the alternative, this court should strike those conditions of community custody not authorized by law.

DATED this 19th day of December, 2007.

Respectfully submitted,



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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,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**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.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community

placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(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.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.712

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

RCW 9.94A.715

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a

quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

RCW 10.05.150
Alcoholism program requirements

A deferred prosecution program for alcoholism shall be for a two-year period and shall include, but not be limited to, the following requirements:

(1) Total abstinence from alcohol and all other nonprescribed mind-altering drugs;

(2) Participation in an intensive inpatient or intensive outpatient program in a state-approved alcoholism treatment program;

(3) Participation in a minimum of two meetings per week of an alcoholism self-help recovery support group, as determined by the assessing agency, for the duration of the treatment program;

(4) Participation in an alcoholism self-help recovery support group, as determined by the assessing agency, from the date of court approval of the plan to entry into intensive treatment;

(5) Not less than weekly approved outpatient counseling, group or individual, for a minimum of six months following the intensive phase of treatment;

(6) Not less than monthly outpatient contact, group or individual, for the remainder of the two-year deferred prosecution period;

(7) The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment shall be reserved to the treating facility and the petitioner's physician;

(8) All treatment within the purview of this section shall occur within or be approved by a state-approved alcoholism treatment program as described in chapter 70.96A RCW;

(9) Signature of the petitioner agreeing to the terms and conditions of the treatment program.

CrR 4.2

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

