

NO. 38201-6

FILED
COURT OF APPEALS
DIVISION II

09 MAR 20 PM 1:54

STATE OF WASHINGTON
BY *[Signature]*

DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH ALLAN ROSARIO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 08-1-02672-0

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Should this court decline to view the defendant’s issue on appeal as it is not yet ripe for review?..... 1

2. Has the defendant received sufficient notice that the terms of his sentence preclude him from having contact with the Burger Castle Restaurant and Mr. Lee? 1

B. STATEMENT OF THE CASE. 1

C. ARGUMENT.....3

1. SHOULD THIS COURT DECLINE TO VIEW THE DEFENDANT’S ISSUE ON APPEAL AS IT IS NOT YET RIPE FOR REVIEW?3

2. IF THIS COURT DOES CHOOSE TO REVIEW THE ISSUE ON THE MERITS, HAS THE DEFENDANT RECEIVED SUFFICIENT NOTICE THAT THE TERMS OF HIS SENTENCE PRECLUDE HIM FROM HAVING CONTACT WITH THE BURGER CASTLE RESTAURANT AND MR. LEE?4

D. CONCLUSION.7

Table of Authorities

State Cases

<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 178, 795 P.2d 693 (1990)	5
<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973)	3
<i>State v. Ancira</i> , 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)	4
<i>State v. Davidson</i> , 116 Wn.2d 917, 921-22, 809 P.2d 1374 (1991).....	4
<i>State v. Eggleston</i> , 164 Wn.2d 61 at 76, 187 P.3d 233 (2008)	3
<i>State v. Riley</i> , 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).....	4
<i>State v. Sandoval</i> , 123 Wn. App. 1, 4, 94 P.3d 323 (2004)	5
<i>State v. Ziegenfuss</i> , 118 Wn. App. 110, 113, 74 P.3d 1205 (2003).....	3

Federal and Other Jurisdictions

<i>Alford v. United States</i> , 282 U.S. 687, 691, 51 S.Ct. 218, 219, 74 L. Ed. 624 (1931).....	2
---	---

Statutes

RCW 9.94A.030(13).....	4
RCW 9.94A.030(53).....	4
RCW 9.94A.505(8).....	4

Rules and Regulations

CrR 7.8(a)	6
RAP 7.2(e).....	6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court decline to view the defendant's issue on appeal as it is not yet ripe for review?

2. Has the defendant received sufficient notice that the terms of his sentence preclude him from having contact with the Burger Castle Restaurant and Mr. Lee?

B. STATEMENT OF THE CASE.

On June 5, 2008, the State charged JOSEPH ALLEN ROSARIO, hereinafter "defendant," with one count of first degree robbery¹. CP 1².

The declaration and determination of probable cause alleged that on June 4, 2008, the defendant entered the Burger Castle restaurant located at 5013 South 56th Street in Tacoma, Washington, placed a backpack on the counter, and demanded that the employees put money in it. CP 2. The defendant then reached over the counter and grabbed

¹ The information alleged that the defendant:
did unlawfully and feloniously take personal property belonging to another with intent to steal from the person or in the presence of Young Lee, the owner thereof or a person having dominion or control over said property, against such person's will by use of force or threatened force, violence, or fear of injury to Young Lee, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking, and in the commission thereof, or in immediate flight therefrom, [defendant] displayed what appeared to be a weapon, to wit: a pistol ..."

² Citations to Clerk's Papers will be to "CP" and citations to the Verbatim Report of Proceeding will be to "RP."

approximately two hundred and fifty dollars (\$250.00) from the till. CP 2. The defendant told the employees he had a gun and reached into his jacket. CP 2.

On July 24, 2008, the State filed an amended information charging the defendant with one count of second degree robbery in exchange for the defendant's guilty plea. CP 3. The State amended the charge because there was no evidence that the defendant actually had a firearm. CP 4. All the other information remained the same. *See* CP 4.

The defendant entered an *Alford*³ plea to the amended charge. CP 5-13. The statement of defendant on plea of guilty set forth the elements of second degree robbery as described in the amended information. CP 5. The defendant agreed as part of the plea to have no direct or indirect contact with the "victim." CP 8.

The court accepted the defendant's guilty plea, finding that it was made knowingly, intelligently, and willingly. RP 6. The State recommended a low-end, standard range sentence of 33 months in the Department of Corrections and included the requirement of having no direct or indirect contact with the "victims." RP 7. The court followed the recommendation, including having no contact with the "victim." RP 8-9.

³ *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 219, 74 L. Ed. 624 (1931)

C. ARGUMENT.

1. SHOULD THIS COURT DECLINE TO VIEW
THE DEFENDANT'S ISSUE ON APPEAL AS IT
IS NOT YET RIPE FOR REVIEW?

The court's jurisdiction over an issue cannot be invoked unless a justiciable controversy exists. *State v. Eggleston*, 164 Wn.2d 61 at 76, 187 P.3d 233 (2008) (citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973)). A justiciable controversy is:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Id. at 76-77.

In this case, the defendant asserts that a court-imposed condition of sentencing violates due process because it is too vague to be enforceable. In order for his claim to be ripe for review defendant should be accused of having violated the no contact provisions of the sentence. *See State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003)(holding that the constitutionality of the defendant's requirement to pay legal financial obligations was not ripe for review because, as she had not failed to pay the obligations or been sanctioned for non-payment, she could not show harm). His argument would be properly before the review court if the

defendant is ever alleged to be in violation. Without an alleged violation, any issue would be speculative.

2. IF THIS COURT DOES CHOOSE TO REVIEW THE ISSUE ON THE MERITS, HAS THE DEFENDANT RECEIVED SUFFICIENT NOTICE THAT THE TERMS OF HIS SENTENCE PRECLUDE HIM FROM HAVING CONTACT WITH THE BURGER CASTLE RESTAURANT AND MR. LEE?

Under RCW 9.94A.505(8) a court may impose crime-related prohibitions on any sentence. A ‘crime-related prohibition’ means “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted . . .” RCW 9.94A.030(13). A trial court’s imposition of a crime related prohibition is reviewed for an abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)(citing *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)).

The SRA defines a victim as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(53). Washington courts accept that a victim can be an entity other than a human person. *See State v. Davidson*, 116 Wn.2d 917, 921-22, 809 P.2d 1374 (1991)(holding that the City of Seattle meets the statutory definition of “victim” for purposes of restitution where the victim of an assault was a city employee.)

The facts in the present case are clear that there are two entities who meet the criteria of “victim.” The defendant entered the Burger Castle restaurant and took money from the till, while he threatened use of a gun on employee, Mr. Lee. CP 1-4. Both Burger Castle and Mr. Lee were named in the charging documents and it is obvious that they were both victims. As contact with the victims directly relates to the crime of robbery, the court properly imposed the no contact order.

While the defendant does not challenge the court’s authority to restrict his contact with the victims of this case, he contends that the prohibition in the judgment and sentence violates due process. The defendant claims that, because the amended information and the declaration for determination of probable cause specify different victims, the judgment and sentence must specifically name the victims or he could “not be certain whether he was in violation of the no contact order.” *See* Appellant’s Brief at 4.

The defendant’s argument strains logic. Due process guarantees citizens fair warning of what constitutes prohibited conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). To satisfy due process, a prohibition must be definite enough that an ordinary person can understand what conduct is prohibited. *Id.* The prohibition must provide standards of guilt that are clear enough to preclude arbitrary enforcement. *Id.* Due process challenges are reviewed under a de novo standard. *State v. Sandoval*, 123 Wn. App. 1, 4, 94 P.3d 323 (2004).

This is not a case where the State dismissed counts relating to other victims, which would create an ambiguity as to whether those people were included in the court's order. Nor is this a case where the defendant walked into a crowded restaurant and threatened several unidentified people where he would never know if anyone he contacted in the future happened to be there that day. Instead, the defendant entered a business, identified in the declaration, and took money in the presence of an employee, identified in the information. CP 1-4. An ordinary person would recognize that he cannot go back to the restaurant he robbed and that he cannot have contact with the employee that he took the money from. The defendant has received fair warning that he cannot have contact with Burger Castle or Mr. Lee.

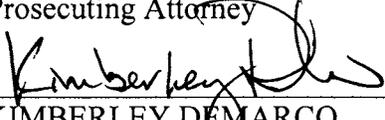
If this court disagrees with the State's analysis and finds that the no contact provision violates due process, the only appropriate remedy is entry of an order clarifying the judgment and sentence. *See* CrR 7.8(a) and RAP 7.2(e).

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court to remand to the trial court correction of the scrivener's error within the judgment and sentence.

DATED: MARCH 19, 2009

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/19/09 _____
Date Signature

DEPUTY
STATE OF WASHINGTON
BY
09 MAR 20 PM 1:54
COURT OF APPEALS
DIVISION II