

NO. 38558-9-II

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

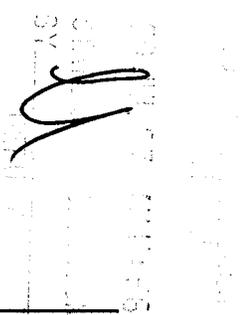
STATE OF WASHINGTON,

Respondent,

v.

AZAELOPEZ,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Nichols, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The community custody condition that Mr. Lopez “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” is (1) not crime-related, and (2) unconstitutionally vague.
2. Although unchallenged at the trial court, the drug paraphernalia condition can be challenged for the first time on appeal.
3. The trial court erred in imposing community custody on the tampering with physical evidence conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Crime-related prohibitions can be imposed on a term of community custody. Mr. Lopez, who was convicted of delivery of methamphetamine, was sentenced to a term of community custody including certain conditions to include that he not possess or use any item that “can be used” as drug paraphernalia. At sentencing, Mr. Lopez did not object to the condition.
 - (a) Is the paraphernalia condition actually crime related when virtually anything can be possessed or used for drug related purposes even if Mr. Lopez has no such intent?
 - (b) Should the paraphernalia condition be stricken because it is unconstitutionally vague?

- (c) Under Bahl,² can Mr. Lopez challenge the paraphernalia condition for the first time on appeal?
2. The court cannot impose community custody on a gross misdemeanor offense if the court sentences a defendant to a full year of incarceration on that charge. When the trial court sentenced Mr. Lopez to 365 unsuspended days on his gross misdemeanor tampering with evidence conviction, did it err by also imposing 24-months of community custody?

C. STATEMENT OF THE CASE

A jury found Azael Lopez guilty of all four counts charged in a third amended information: count 1, possession of methamphetamine with intent to deliver within 1,000 feet of a school bus stop; count 2, tampering with physical evidence; and counts 3 and 4, bailing jumping on a class B or C felony. CP 13-14, 45-49.

The court sentenced Mr. Lopez within his standard range on the felony charges and also added a 9-12 month term of community custody. CP 61, 64. The court ordered certain conditions of community custody to include the following:

∞ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or

² State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)

transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and date storage devices.

CP 66. Mr. Lopez did not object to this, or any community custody conditions imposed by the trial court. RP 409-24.²

On the gross misdemeanor tampering with physical evidence, the court imposed a sentence of 365 days to be served in DOC custody concurrent with the felony sentences. CP 51. Although none of the 365 days were suspended or deferred, the court imposed 24 months of probation to be supervised by DOC. CP 51, 54-57.

Mr. Lopez appeals all portions of his judgment and sentence.

CP 77.

D. ARGUMENT

1. THE PARAPHERNALIA CONDITION MUST BE STRICKEN. IT IS NOT A VALID CRIME RELATED PROHIBITION AND IT IS UNCONSTITUTIONALLY VAGUE.

a. The paraphernalia condition is not a valid crime related prohibition.

The community custody condition that Mr. Lopez not possess or use any paraphernalia is not a valid crime related

² The report of proceedings (RP) consists of a several bound volumes. In citing to the record, the particular volume number where the page or pages can be found precedes the "RP."

prohibition. As it is not crime related, it should be stricken from his judgment and sentence.³

In Mr. Lopez's case, the court imposed the following condition of community custody:

∞ 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, police scanners, and hand held electronic scheduling and date storage devices.

RCW 9.94A.700(5)(e)⁴ allows sentencing courts to impose "crime related prohibitions" as part of community custody. But as this Court has noted in Zimmer, mere imposition of a condition of community custody does not make it a valid crime related condition. State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008). In Zimmer, this Court held that a prohibition on possession of a cellular phone and an "electronic data storage device" was not a crime related prohibition because there was no evidence in the record indicating that the defendant used such a device in committing the crime. Zimmer, 146 Wn. App. at 413-14.

³ A sentencing court's application of the community custody conditions provisions of the Sentencing Reform Act is subject to de novo review. State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007).

⁴ Effective until August 1, 2009, then recodified at RCW 9.94B.050

Similar to Zimmer, Mr. Lopez is prohibited from possessing things that "can be used" for drug related purposes, even if Mr. Lopez has no such intent. Virtually anything, even the most common household items can be "used for drug purposes." In fact, when the police arrested Mr. Lopez, he was near some plastic baggies. 2RP 135-37, 149-152, 158. Such baggies are a common item in virtually all homes and "can be used" for drug purposes. But are they always? In Mr. Lopez's case, as in Zimmer, it is difficult to see how possession of such common household items as plastic baggies, spoons, boxes, matches, knives, or other random objects are crime related, unless the intent is to use these items for drug related purposes. As such, the drug paraphernalia provision in Mr. Lopez's judgment and sentence is not a "crime-related prohibition" under RCW 9.94A.700(5)(e). The provision should be stricken.

b. The paraphernalia condition is too vague to be enforced.

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

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 Wn.2d at 263, 676 P.2d 996 (1984). 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, at 865. A statute is not facially vague if it is susceptible to a constitutional interpretation. State v. Miller, 103 Wn.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the

statute's constitutionality. Shepherd, at 865. Impossible standards of specificity are not required. Hi-Starr, Inc. v. Liquor Control Bd., 106 Wn.2d 455, 465, 722 P.2d 808 (1986).

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

As noted above and as repeated here for the reader's convenience, the following community custody condition imposed by the trial court 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, police scanners, and hand held electronic scheduling and date storage devices.

CP 66.

In the condition, 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 to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can be 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 Mr. Lopez 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 Mr. Lopez 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, Section 3 and United States Constitution, Fourteenth Amendment.

c. The paraphernalia condition can be challenged for the first time on appeal.

Earlier this year, in Valencia, this Court denied an identical vagueness challenge on the identical Clark County paraphernalia community custody condition. State v. Valencia, 148 Wn. App. 302, 198 P.3d 1065 (2009). The State Supreme Court has accepted review. (See State v. Valencia, no. 827311). The following is from the petition for review and is offered to preserve this issue in Mr. Lopez's case.

In Bahl, defendant Bahl appealed community custody conditions imposed following his conviction for second degree rape, arguing that they were void for vagueness. State v. Bahl, 164 Wn.2d 739. These conditions prohibited Bahl from possessing "pornographic materials" and "sexual stimulus material." The State responded, in part, that since Bahl was still in prison and as DOC was not trying to enforce these conditions, Bahl's constitutional vagueness challenge was not yet ripe.

In addressing the ripeness question, this court relied heavily upon the analysis of the Third Circuit Court of Appeals' decision in United States v. Loy, 237 F.3d 251 (3d Cir. 2001). In Loy, the government argued that the court should refrain from reviewing a

defendant's vagueness challenge to his probation conditions prior to a claim that the defendant had violated one of those conditions. Specifically, the government argued that "because vagueness challenges may typically only be made in the context of particular purported violations, [the defendant] must wait until he is facing revocation proceedings before he will be able to raise his claim." Loy, supra.

In addressing this argument, the court first noted that the other circuit courts of appeal uniformly allow defendants to challenge conditions of probation on direct review. Indeed, the failure to do so could well be seen as a waiver of the right to object. Second, under the "prudential ripeness doctrine" in which the court addresses the hardship that will arise from refusing to review a challenged condition of probation, the court found that failure to address a vagueness argument would cause hardship to the defendant. Specifically, the court noted "the fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship." U.S. v. Loy, 237 F.3d at 257. In addition, the court noted that a defendant should not have to "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the

exercise of his constitutional rights.” Id. (quoting Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)). Finally, under the “fitness for judicial review” doctrine, the court in Loy noted that the vagueness challenge to the probation condition in question was almost exclusively a question of law. As such, it was particularly ripe for review.

After reviewing the Loy decision, the Bahl court held that a defendant could make a vagueness challenge to community custody conditions as part of a direct appeal if the challenge meets the “ripeness doctrine.” The court held:

For many of the same reasons that the court held in Loy that the defendant there could bring his pre-enforcement vagueness challenge, we hold that a defendant may assert a pre-enforcement vagueness challenge to sentencing conditions if the challenge is sufficiently ripe. First, as noted, such challenges have routinely been reviewed in Washington without undue difficulty. Second, pre-enforcement review can potentially avoid not only piecemeal review but can also avoid revocation proceedings that would have been unnecessary if a vague term had been evaluated in a more timely manner. Third, not only can this serve the interest of judicial efficiency, but pre-enforcement review of vagueness challenges helps prevent hardship on the defendant, who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis.

Bahl, 164 Wn.2d at 684-85.

The Bahl court then went on to note that under the “ripeness doctrine”, the court applies the following four criteria for determining whether or not a vagueness challenge is sufficiently ripe for judicial review:

- (1) Whether or not the issue the defendant argues is primarily legal or not;
- (2) Whether or not the record requires further factual development for adequate review;
- (3) Whether or not the challenged action is final; and
- (4) Whether or not withholding the court’s consideration will create a hardship to the parties.

Bahl, 164 Wn.2d 685.

In addressing these criteria, the Bahl court had little difficulty in finding Bahl’s vagueness challenge was sufficiently ripe. Under the first two factors, the court found that Bahl’s argument was primarily legal in nature and did not require the application of any particular set of facts in order to determine its application. Under the third factor, the conditions Bahl challenged were “final” since they were made a part of the sentence imposed by the court. Under the fourth factor, the imposition of the conditions upon Bahl’s release would cause Bahl hardship at the time of his release, regardless of DOC’s enforcement efforts. This would be because,

as in Loy, the defendant would immediately upon release have to alter his conduct in an attempt to conform with potentially vague conditions, and he would have to live in constant fear of arrest and incarceration upon a violation of what could ultimately be held an unconstitutional requirement. Thus, in Bahl, the court held that Bahl's challenge to his community custody conditions was "ripe for determination."

In Mr. Lopez's case, his challenge to the paraphernalia community custody condition is also "ripe for determination" under the four factors recognized in Bahl. First, as in Bahl, the argument on vagueness challenge is primarily legal in nature. Second, it is necessary that DOC actually make a claim of a violation to create a factual setting in order to sufficiently narrow the legal question that the court must address. Specifically, in Bahl, Bahl argued that the condition prohibiting him from possessing "pornography" was vague because the term "pornography" was unconstitutionally vague. The court in Bahl found this is primarily a legal question. Similarly, in Mr. Lopez's case, the conditions prohibiting him from possession of anything that can be used as "drug paraphernalia" is vague because the term "drug paraphernalia" is unconstitutionally vague.

As in Bahl, this is primarily a legal question that does not need factual development for adequate review.

Third, in Mr. Lopez's case, the challenged condition of community custody is "final" in the same manner that in Bahl the challenged condition of community custody was final because both were imposed as part of the sentence. Fourth, in Bahl, the court held that the refusal to adjudicate Bahl's vagueness challenge created significant hardship because, upon release, Bahl would have to conform his conduct to meet what might well be ultimately held to be an unconstitutionally vague condition, and Bahl would also have to constantly live in fear that he would be arrested and incarcerated for violation of an unconstitutionally vague community custody condition. Similarly, in Mr. Lopez's case, as in Bahl, this court's refusal to adjudicate Mr. Lopez's vagueness challenge would also cause the same hardship to Mr. Lopez as such a failure to adjudicate would have caused Bahl. Thus, in the same manner that Bahl's vagueness challenge was ripe for consideration on direct review, in Mr. Lopez's case his vagueness challenges to the paraphernalia community custody condition is also ripe for consideration on direct review.

The error that the Court committed in Valencia was that it set an additional condition beyond those set by this court in Bahl. In her dissent, Judge Van Deren notes the following on this issue:

State v. Bahl, 164 Wn.2d 739, 750-51, 193 P.3d 678 (2008), sets four requirements: (1) a primarily legal issue; (2) no necessary further factual development; (3) final action; and (4) a consideration of hardship to the parties if the court does not review the condition imposed. The majority adds a fifth requirement, evidence of harm before review is granted. The majority merely repeats Motter's requirement to show harm before review will be granted, State v. Motter, 139 Wn.App. 779, 803-04, 162 P.3d 1190 (2007), essentially transforming the need for further factual development under Bahl to ripeness dependent on harm shown.

Harm will arise in the context of a hearing on violation of the community custody conditions, with sanctions imposed, i.e., revocation of community custody or additional time to be served. The majority suggests that following a finding of violation of the condition, a defendant may file a personal restraint petition for relief from unreasonable application or interpretation of the challenged community custody conditions. Majority at 13.

The majority ignores the hardship arising from arrest, hearing, confinement, and the delay inherent in personal restraint petitions and creates a necessity for further factual development via imposition of sanctions for violating community custody conditions that may, indeed, be unwarranted or unconstitutionally vague. This result shifts all of the hardship to the defendant, when addressing the imposition of particular community custody conditions on direct appeal imposes virtually no hardship on the State.

Dissent, at 23.

In fact, the harm that will accrue to Mr. Lopez by the refusal to find his vagueness argument ripe is far more insidious than that even recognized by Judge Van Deren in her dissent because the failure to address the vagueness argument will deny Mr. Lopez his right 'to' or 'of' due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the right to full appellate review under Washington Constitution, Article 1, § 22, and the right to appointed counsel as an indigent under the Sixth Amendment. The following explains how this harm occurs.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. Rheark 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 United States Constitution, Fourteenth Amendment, have full effect. In 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, the 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)).

The problem with the Valencia decision, and the foreseeable problem with Mr. Lopez's case, 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 137-104-080.

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 Valencia is to deny a defendant procedural due process under 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.

2. COMMUNITY CUSTODY WAS ILLEGALLY IMPOSED ON MR. LOPEZ'S TAMPERING WITH EVIDENCE CONVICTION.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn. 2d 472, 477, 973 P.2d 452 (1999) (citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)). At sentencing, Mr. Lopez did not challenge the trial court's imposition of 24 months of probation on his tampering with evidence conviction. He is challenging it on appeal.

The imposition of probation is not authorized when the maximum jail sentence is imposed on an offender. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006). The superior court's authority to suspend or defer a sentence is codified in RCW 9.95.210, which states:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

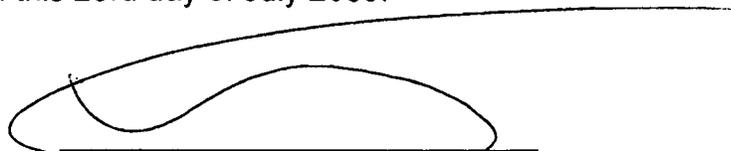
Here the trial court did not suspend any of Mr. Lopez's one year sentence for tampering with physical evidence. Instead, the court imposed the maximum sentence of 365 days in DOC custody concurrent with the lengthy term imposed on his felony convictions. Because the court did not suspend any of Mr. Lopez's sentence, it cannot order that Mr. Lopez complete a period of probation or comply with any probationary conditions as to that charge. Accordingly, the 24 months of misdemeanor probation must be stricken from his judgment and sentence.

E. CONCLUSION

Mr. Lopez respectfully requests that the paraphernalia condition be stricken from his felony judgment and sentence. He

also requests that the 24 months of DOC probation be stricken from his misdemeanor judgment and sentence.

Respectfully submitted this 23rd day of July 2009.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUTA', is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

~~LISA E. TABBUTA~~ WSBA #21344
Attorney for Appellant

