

NO. 38558-9-II

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

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STATE OF WASHINGTON, Respondent

v.

AZAEL ORTIZ LOPEZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN F. NICHOLS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-00619-2

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

RACHAEL R. PROBSTFEL, WSBA #37878  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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STATE OF WASHINGTON  
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I. STATEMENT OF FACTS

The State accepts the Statement of the Facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR

A. THE ASSIGNMENT OF ERROR AS TO COMMUNITY CUSTODY CONDITION FAILS

1. Mr. Lopez's Challenge is Not Ripe for Review

Mr. Lopez challenges his sentence, specifically that the community custody condition forbidding possession or use of drug paraphernalia is unconstitutionally vague. This challenge is premature and not ripe for review.

The community custody condition of Mr. Lopez's sentence that he challenges states: "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 data storage devices." (CP 66).

The Court of Appeals addressed this exact issue in State v. Valencia, 148 Wn. App. 302, 198 P.3d 1065 (2009). In Valencia, the defendants challenged the same community custody condition, also

imposed by a Court in Clark County. In Valencia, the Court of Appeals found that this challenge was premature and not ripe for review. State v. Valencia, 148 Wn. App. 302, 317, 198 P.3d 1065, 1072 (2009). The holding in Valencia was based on the Court's decision in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007), review denied, 163 Wn.2d 1025 (2008). In Motter, the Court held that challenges to conditions of community custody are not ripe for review. Motter, 139 Wn. App. at 804.

Like in this case and Valencia, in Motter, this Court held that the defendant's challenge to his community custody provision prohibiting possession of drug paraphernalia was not ripe for review. Motter, 139 Wn. App. at 804. Like in Motter, Mr. Lopez has "not been harmed by this potential for error and this issue therefore is not ripe for our review." Id. Mr. Lopez, likewise, has not shown that the community custody provision has harmfully affected him. See State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996) (stating the unconstitutionality of a law is not ripe for review unless the person is harmfully affected by the part of the law alleged to be unconstitutional).

In Valencia, this Court addressed arguments by the defendants that they should overrule Motter and address their claim that the community custody condition is vague and unconstitutional. Valencia, 148 Wn. App. at 318. This Court indicated that the defendants will have an avenue for

appellate review of the enforcement and constitutionality of a community custody condition aside from this initial appeal. Id. A defendant found to have violated a community custody condition may obtain review of the appellate courts through a personal restraint petition. Id. (citing RAP 16.4(c)(6); In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148, 866 P.2d 8 (1994)).

The Court in Valencia, considered the Washington State Supreme Court's ruling in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), which held that a pre-enforcement challenge to a community custody condition prohibiting the possession of pornographic material was ripe for review. The Supreme Court found that the challenge was ripe for review because it implicated First Amendment rights and dealt with a purely legal issue that courts could solve without need for additional facts. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). The Bahl Court suggested a test for courts to determine whether a challenge is sufficiently mature. First, a claim is fit for judicial determination when (1) the issues raised are primarily legal, (2) the issues do not require further factual development, and (3) the challenged action is final. Id. at 751. The reviewing court also must consider "the hardship to the parties of withholding court consideration." Id. (quoting First United Methodist Church of Seattle v. Hering Exam'r for Seattle Landmark Pres. Bd., 129

Wn.2d 238, 255-56, 916 P.2d 374 (1996) (Dolliver, J. dissenting)). The Court in Valencia found that the defendants' challenge does not satisfy this ripeness test. Valencia, 148 Wn. App. at 320. Likely, Mr. Lopez's challenge does not satisfy the Bahl test.

In Valencia, the Court noted that the community custody condition challenged by the defendants does not implicate any First Amendment rights. Valencia, 148 Wn. App. at 320. The Court also noted that vagueness challenges which do not involve First Amendment rights must be evaluated in light of the particular facts of each case, rather than for facial invalidity, a purely legal analysis. Id. (citing City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990)). Therefore, the Valencia Court held, a determination of whether the condition is vague as applied to these defendants is premature until the condition causes actual harm based on the specific facts alleged to violate the condition. Their challenge did not satisfy the first part of the test set forth in Bahl. Id.

The Valencia Court also found that, specific to the defendants' community custody violation, a court's determination of whether they had been provided sufficient warning of what items they are prohibited from possessing necessarily rests on a factual record demonstrating the manner in which they used or possessed the item alleged to violate the prohibition. Valencia, 148 Wn. App. at 320. Therefore, the Court concluded that the

defendants' challenge also failed to meet the second part of the Bahl test. Id. at 321.

The Court also noted in Valencia, that a trial court cannot anticipate all future unlawful modifications or potential illegal uses of otherwise innocent items before lawfully conditioning an offender's release. Valencia, 148 Wn. App. at 321. Because it is not possible for the trial court to anticipate unlawful modifications and uses of such innocent items, the validity of an alleged violation is necessarily fact-based. Id. Therefore, as in Valencia, Mr. Lopez's challenge is premature and not ripe for review at this time.

## 2. Mr. Lopez's Challenge Fails on the Merits

Even if Mr. Lopez's challenge to his community custody condition was ripe for review, the challenge still fails.

RCW 9.94A.700(5)(e) authorizes the sentencing court to order defendants to "comply with any crime-related prohibitions." Forbidding a defendant from possessing drug paraphernalia where the conviction was related to drugs or substance abuse, "is a 'crime-related prohibition' authorized under RCW 9.94A.700(5)(e)." State v. Valencia, 148 Wn. App. 302, 323, 198 P.3d 1065, 1075 (2009) (quoting State v. Motter, 139 Wn. App. 797, 804, 162 P.3d 1190 (2007)).

A community custody provision may be void for vagueness if it fails to define the activity that it prohibits. Motter, 139 Wn. App. at 804. This Court reviews a sentencing court's imposition of community custody conditions for abuse of discretion. Valencia, 148 Wn. App. at 324. And, a party challenging a community custody condition on the grounds that a provision not affecting a First Amendment right is unconstitutionally vague must carry the burden of proving the provision unconstitutional beyond a reasonable doubt. Id.

Forbidding a defendant convicted of Possession of Methamphetamine with Intent to Deliver within 1,000 feet of a School Bus Stop from possessing drug paraphernalia including items which can be used for the ingestion or processing of controlled substances, or which can be used to transfer controlled substances such as scales, pagers, police scanners and hand held electronic scheduling and date storage devices is a crime-related prohibition. As in Valencia, in Mr. Lopez's case, there is supporting evidence for the trial court's finding that all the prohibitions are crime-related.

Therefore, since the prohibitions are crime-related, and the vagueness challenge is not ripe for the review, the sentencing court did not abuse its discretion in prohibiting the defendant as it did while the defendant is on community custody.

B. THE STATE CONCEDES THE TRIAL COURT ERRED  
IN IMPOSING 24 MONTHS OF PROBATION ON THE  
MISDEMEANOR CONVICTION

A trial court commits reversible error when it exceeds its sentencing authority. In re Pers. Restraint of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005). A trial court must act within the limits of the sentencing statutes when setting probationary conditions. State v. Farmer, 39 Wn.2d 675, 679, 237 P.2d 734 (1951); State ex rel. Schock v. Barnett, 42 Wn.2d 929, 931-32, 259 P.2d 404 (1953). The court's imposition of sentence, including probation, is void if the court does not follow statutory provisions. Id. RCW 9.95.210(1) sets the parameters for the sentencing court's imposition of probation conditions. It 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." Id.

Division One of this Court held that where the sentencing court imposes a maximum term of confinement, RCW 9.95.210 does not allow the sentencing court to impose probation without suspending at least some of the confinement. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006). The maximum penalty for the offense of Tampering with Physical Evidence is 365 days and a \$5,000 fine. RCW 9.92.020.

Therefore, under RCW 9.95.210(1), the sentencing court had no authority to impose the full 365 days and probation to follow Mr. Lopez's release. Thus the trial court's sentencing of Mr. Lopez to 365 days in jail, unsuspended, followed by two years probation exceeded the two-year statutory maximum by one year.

The State requests this Court accept its concession of error and remand to the trial court to correct Mr. Lopez's judgment and sentence as to this issue only.

III. CONCLUSION

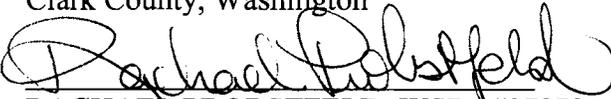
The trial court should be affirmed in all respects except as alleged in Assignment number 2

DATED this 31 day of August, 2009.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
RACHAEL PROBSTFELD, WSBA#37878  
Deputy Prosecuting Attorney

