

NO. 38773-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONNA A. BROEKE,

Appellant.

COPIES
STATE OF WASHINGTON
BY [Signature]
[Date]

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

The Honorable John Wulle, Judge

BRIEF OF APPELLANT

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6. The trial court erred in not granting Ms. Broeke's motion to suppress all the evidence that followed from her illegal detention after the police unlawfully seized her purse.

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her defense or was essential to a fair determination of the case; and (2) the informant was not a material witness to the crimes charged.

8. The trial court erred in refusing to hold an in camera review of the informant named in the search warrant.
9. The trial court erred in not ordering that the informant's name be disclosed.
10. Ms. Broeke was denied her right to a trial.
11. Ms. Broeke was denied her right to compel the production of a witness against her.
12. The community custody condition that Ms. Broeke "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.
13. Although unchallenged at the trial court, the drug paraphernalia condition can be challenged for the first time on appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the police illegally seize Ms. Broeke when they refused to return her purse without any lawful authority?
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- 3. Crime-related prohibitions can be imposed on a term of community custody. Ms. Broeke, who was convicted of delivery of methamphetamine, was sentenced to a term of community custody including certain conditions to include that she not possess or use any item that "can be used" as drug paraphernalia. At sentencing, Ms. Broeke 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 Ms. Broeke has no such intent?**
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C. STATEMENT OF THE CASE

1. Procedural Overview.

Donna Broeke was tried to a jury on a two-count information charging possession with intent to deliver methamphetamine (count 1) and possession of methamphetamine (count 2) . CP 1-3. The possession with intent charge included a school bus stop enhancement.² Both offenses were alleged to have occurred on the same day although at separate times. CP 1-3.

¹ State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)

² Originally, Ms. Broeke's charges were joined with several other defendants, but she was ultimately tried alone. All of the co-defendants' charges were apparently resolved prior to Ms. Broeke's trial.

Ms. Broeke filed several pre-trial motions including a CrR 3.6 motion to suppress evidence and a motion to compel disclosure of an informant.³ CP 11-19, 20-42. The trial court heard both motions, as well as a CrR 3.5 hearing, pre-trial. 1RP 38-156, 161-180. The court denied the motions and found Ms. Broeke's statements to the police admissible.⁴ 1RP 137-145, 176-77. Ms. Broeke renewed her request to disclose the informant throughout the trial. The court denied her requests. 4RP 476. The court entered written findings of fact and conclusions supporting its decisions. CP 158-68.

The jury found Ms. Broeke guilty of both charges but acquitted her of the school bus stop enhancement. CP 125-128.

Ms. Broeke had no criminal history. CP 140. The trial court, after concluding that Ms. Broeke was battered by the main perpetrator in the case, Gabriel Corona, sentenced Ms. Broeke to the low end of the standard range. CP 141, 144; 4RP 593. The court also imposed 9-12 months of community custody to include the following condition:

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

³ Other motions were also filed but are not germane to the appeal so will not be discussed.

⁴ See section 2 below for more details of the hearing.

substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

CP 145, 146. Ms. Broeke did not object to this, or to any community custody conditions imposed by the trial court.

Ms. Broeke appeals all portions of her judgment and sentence. CP 155-56.

2. Suppression motion testimony and argument.

(i) Testimony.

Officer Spencer Harris of the Vancouver Police Neighborhood Response Team (NRT) obtained a search warrant. 1RP 60-62; CP 32-42. The target of the search warrant was Gabriel Corona. *Id.* The search warrant allowed the search of Corona's Ridgefield home⁵ and of two vehicles including a silver Ford Expedition. 1RP 61; CP 32-42. The search warrant was based on information provided by a known-to-the-police-but-unnamed informant who was providing information to the police in exchange for leniency on pending charges. CP 34. In the warrant, it is noted that the informant purchased methamphetamine from Corona in Corona's Ridgefield home at least ten times in the last four months CP 35. The informant had otherwise purchased methamphetamine from Corona in his home or in Corona's vehicle at least twenty times. CP

⁵ The address is 112 South 32nd Place in Ridgefield, Washington.

35. Although Ms. Broeke lived with Corona during this time, the informant made no mention of ever having seen Ms. Broeke in the home, in Corona's vehicle, or involved in Corona's drug dealing. The only mention of Ms. Broeke in the warrant is as a passenger in Corona's vehicle during a traffic stop of Corona. CP 36.

On March 6, 2008, Officer Harris surveilled the home in the hope that the subject of the search warrant, Gabriel Corona, would either prove not to be home or would leave the home. 1RP 62. While staked out and watching, Officer Harris saw a Nissan Maxima pull into Corona's street and be directed by Corona to park nearby. 1RP 63. Two Hispanic men got out of the Maxima and walked into Corona's garage. 1RP 63. The men shook hands and, in so doing, possibly exchanged something. 1RP 63. The men went into the house. After about ten minutes, the two men returned to the Maxima and drove away. 1RP 63-64.

A few minutes later, Officer Harris watched Corona and Donna Broeke leave the house. 1RP 66. Ms. Broeke carried a large purse. 1RP 67. The couple got into a silver Ford Expedition and drove off. 1RP 67. Officer Harris radioed to Officer Jeremy Free to stop the Expedition. 1RP 67, 69. Corona had various arrest warrants and the police wanted to search the Expedition pursuant to the search warrant. 1RP 50, 91, 92. Officer Free pulled the Expedition over. 1RP 40-41. Corona was arrested

on his warrants. 1RP 43. During his arrest, Corona yelled at Ms. Broeke, the driver, to lock the doors to prevent the search of herself and the Expedition. 1RP 44. Officer Free told Corona that there was a search warrant for the Expedition. 1RP 44.

Officer Free told Ms. Broeke to get out of the Expedition so he could search it. 1RP 104. Ms. Broeke wanted to take her purse with her but was told that she had to leave it in the Expedition because everything in the Expedition was subject to the search warrant. 1RP 104. Officer Free told Ms. Broeke that she was free to leave but that if she wanted to stay she should stand on a nearby berm to avoid being too close to traffic. 1RP 45. Ms. Broeke did not feel that she was free to leave because the police had her purse with everything in it – her identification, her keys, her cell phone, her money. 1RP 105. She also felt that she was somehow in trouble because the police had pulled her over. 1RP 112.

Officer Harris did nothing to dispel Ms Broeke's sense that she could not leave. Officer Harris walked up to Ms. Broeke on the berm and read her Miranda rights.⁶ 1RP 70-71. Ms. Broeke said a few things to include that she wanted to be at the house when the search warrant was served. 1RP 72. Ms. Broeke's son and Ms. Broeke's sister were at the

⁶ There is no record that the Miranda rights were accurate and that Ms. Broeke waived her rights and made voluntary post-Miranda statements to the police.

house and she wanted to be there to help lessen the trauma on her family. 1RP 106. Officer Harris told Ms. Broeke that she could not walk to her house because having someone walk up to a house during the service of a search warrant was dangerous. 1RP 72.

While she was waiting for the police to finish the search of the Expedition, she asked Office Harris to get her cigarettes from her purse. 1RP 111. He did so but he did not return the purse or any of its other contents to Ms. Broeke. 1RP 106.

Once the police were finished with the search of the Expedition, they gathered up to drive to Corona's residence. The police did not return Ms. Broeke's purse. 1RP 105. Ms. Broeke still did not feel free to leave because the police retained possession of her purse even though nothing of evidentiary value was found in it. 1RP 100, 105. Ms. Broeke agreed with the police officer to be driven to the residence in Officer Free's police car. 1RP 106. She was patted down for weapons and placed, uncuffed, in the backseat of Office Free's police car. 1RP 106. Corona, in handcuffs, was also in the back of Officer Free's police car. 1RP 46.

Once Officer Free arrived at the residence, he parked but did not let either Ms. Broeke or Corona go into the residence. 1RP 80. Instead, Officer Harris who had followed Officer Free in the seized Expedition, went into the house to talk to the officers who were serving the warrants.

1RP 75, 80, 96, 97. Ms. Broeke, in the meantime, could not get out of Officer Free's car because it was a police car and the backseat door handles in police cars don't open; the door has to be opened from the outside. 1RP 95-96. While in the house, Officer Harris learned that a methamphetamine pipe was discovered in the bedroom Corona shares with Ms. Broeke. 1RP 79-80. A scraping from the pipe tested positive for methamphetamine. 1RP 79. Officer Harris went back out to the patrol car and talked to Ms. Broeke who admitted being an occasional user of methamphetamine and smoking it from a pipe in her bedroom. 1RP 80. Ms. Broeke was placed under arrest for possession of methamphetamine. 1RP 81.

Corona told Officer Harris that he wanted to talk to him. 1RP 81. Officer Harris took Corona into the house. 1RP 81. Corona told Officer Harris that he had forced Ms. Broeke to hide methamphetamine on her person when Officer Free signaled the Expedition to stop. 1RP 82. Officer Harris went back out to Officer Free's police car and confronted Ms. Broeke with what Corona had told him. 1RP 82. Ms. Broeke denied having any methamphetamine on her person. 1RP 82. Officer Harris took Ms. Broeke inside to talk to Corona. 1RP 82-83. Corona, in front of the officers, told Ms. Broeke to hand the stuff over to the police. 1RP 82-83. Ms. Broeke reluctantly pulled a very small package of methamphetamine

from her bra. 1RP 83. Corona told Ms. Broeke to hand over the rest of the stuff. 1RP 83-84. Ms. Broeke turned and faced the wall and removed a baggy of methamphetamine from her vagina. 1RP 84. The baggy was slightly smaller than a tennis ball. 1RP 86.

(ii) Argument.

Ms. Broeke argued that she was unlawfully seized from the moment the police told her that she could not take her purse from the Expedition and that everything after that was affected by the taint of the illegal seizure. 1RP 127-31. It made no difference that she wanted to go to the house where the warrant was being served and agreed to be taken there by the police. 1RP 127-31. She was, after all, following her illegally seized purse rather than abandoning it as the police had implicitly suggested she do when she was told that she was free to leave.

The State responded that the police had the authority to seize the purse as part of the search warrant on the Expedition. 1RP 132. And further, Ms. Broeke had consented to being given a ride to the house by the police. 1RP 135.

The court astutely summarized the essence of the legal issues:

What is at the heart of this case is the question of how do we treat a person in a vehicle that the Court has commanded to be searched. And, the second issue is whether someone is free to go who is being told that they are free to go but you don't think that you can go because the police have your purse and you can't access it.

1RP 145. Although the court framed the issues appropriately, it did not answer its own question in any detail. Instead, it adopted the State's position and refused to suppress the evidence. 1RP 145-46.

3. Motion to Disclose the Informant.

At the suppression motion, Ms. Broeke also moved to require the State to disclose the name of the confidential informant who provided information for the search warrant or alternatively, to have an in camera inspection of the informant. 1RP 147-150.

It was Ms. Broeke's theory that the informant, who claimed to be in and out of her house with some frequency, would testify that she was not involved in any way with Corona's drug dealing. 1RP 169-70. In other words, the informant's information would support her defense that although she possessed the methamphetamine, she did not do so with the intent to deliver it because she was not involved in Corona's drug dealing. 1RP 169-70. Such evidence would bolster her argument that she was forced to hide the methamphetamine in her vagina because Corona made her do so and not to hide it from the police so it would be preserved for Corona's further drug dealings. 1RP 169. Specifically, Ms. Brooke argued:

It is relevant and helpful to Ms. Broeke to show she's – wasn't involved in any delivery scheme.

I mean, the evidence that Mr. Meyers⁷ been talking about, defense, we have a general denial, and plus the evidence shows and never really has been contested that Mr. Corona said both to Officer Harris, which Officer Harris repeated here and it's in the police reports, that he just gave it to her and told her to hide it.

So, if they're trying to tie her into a web of intrigue with Mr. Corona, then inevitably that's – the informant's helpful information to us and relevant to show that she's not part of that web of intrigue or conspiracy or accomplice liability because the informant never mentioned to her before being involved in all the transactions we saw there.

1RP 175.

The State explained its theory of the case: Ms. Broeke was part of Corona's overarching drug dealing plan who merely hid the methamphetamine in her vagina to keep it away from the police with the ultimate intent to give it back to Corona so he could continue to his drug dealing ways. 1RP 155.

In denying Ms. Broeke's motion the court offered its own theory on the evidence:

What is interesting here is that – not that Mr. Corona is involved in a scheme to sell drugs, is the fact that Defendant became part of a possessory aspect with Mr. Corona and she intended to help conceal the drugs and deliver them back to Mr. Corona.

And that, to me, I think, complies with the intent and with the delivery. She concealed for the purpose of avoiding and was intending to deliver it back to Mr. Corona. And I think, just given those facts alone, what do we need the CI for? Okay.

1RP 176.

⁷ Mr. Meyers is the prosecutor.

During the defense case, Ms. Broeke renewed her request to have the informant disclosed. 4RP 476. The court again denied the motion.

4. Trial testimony.

The essential story that was heard at the suppression hearing was fleshed out during the trial testimony. The police had a warrant to search Corona's house and Ford Expedition. 2RP 241. Donna Broeke is Mr. Corona's girlfriend. 4RP 486. They live together at a house in Ridgefield. 4RP 485. The police were hoping that Corona would leave the house before service of the search warrant. 2RP 240-41.

Officer Harris was watching the house to see if Corona would leave. 2RP 240. While he was watching the house, two other Hispanic men arrived and engaged in a methamphetamine deal with Corona. 2RP 244-457, 4RP 453. Ms. Broeke was unaware that the men were at the house and engaging in a sale of methamphetamine with Corona. 4RP 487.

Corona did leave the house with Ms. Brooke in the Ford Expedition. 2RP 250-51. Ms. Broeke had a large purse with her when they left the house. 2RP 252. The Expedition was signaled to stop by Officer Free. 2RP 254-55. When Corona saw the police car behind them, he told Ms. Broeke that she had to hide a large chunk of

methamphetamine he had or he would “kick her ass.” 4RP 455. Mr. Broeke believed him and put the methamphetamine in the crotch of her pants. 4RP 489. Ms. Broeke, who is a methamphetamine user, already had a small amount of methamphetamine in a plastic bag in her bra. 4RP 488. Ms. Broeke was unaware until that moment that Corona was a drug dealer. 4RP 487, 513. She thought that he made his income by buying and fixing up cars for resale. 4RP 487.

The police arrested Corona and started to search the Expedition incident to their search warrant. The police told Ms. Broeke to get out of the Expedition and told her that she could not take her purse with her. 4RP 490. Ms. Broeke hung around while the police searched the Expedition because the police had her purse. 4RP 490. Her purse contained such items as her drivers license and identification, her cell phone, her keys, and her cigarettes.

While she was in the back of Officer Free’s car with Corona, he told her that she had to put the large package of methamphetamine in her vagina. 4RP 491. She did not want to do this but she felt she had to avoid being injured by Corona. 4RP 493.

Once she was at the house with Corona, the police found a methamphetamine pipe in her bedroom. 4RP 421. The pipe contained methamphetamine. 4RP 422. She acknowledged that she smoked

methamphetamine with the pipe. She was arrested for possession of the methamphetamine residue in the pipe. 4RP 424.

Corona told Officer Harris that Ms. Broeke had methamphetamine on her person. 4RP 425-427. Ms. Broeke initially denied that she had the methamphetamine. *Id.* However, at Mr. Corona's urging, she produced the user amount of methamphetamine from her bra and the dealer amount of methamphetamine from her vagina. *Id.*

D. ARGUMENT

1. MS. BROEKE WAS ILLEGALLY SEIZED WHEN THE POLICE REFUSED HER ACCESS TO HER PURSE. CONSEQUENTLY, ALL OF THE EVIDENCE OBTAINED AFTER THE ILLEGAL SEIZURE MUST BE SUPPRESSED.

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. Art. I, § 7. This provision protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). A warrantless search or seizure is considered *per se* unconstitutional unless it falls within one of the few exceptions to the warrant requirement. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). When analyzing police-citizen interactions, it must first be determined whether a warrantless search or seizure has taken

place, and if it has, whether the action was justified by an exception to the warrant requirement. State v. O'Neill, 148 Wn.2d ___, 574, 62 P.3d 489 (___).

"[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification." United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). However, a seizure occurs, under Article I, Section 7, when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. O'Neill, 148 Wn.2d at 574. This determination is made by objectively looking at the actions of the law enforcement officer. State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). Moreover, it is elementary that all investigatory detentions constitute a seizure. State v. Armenta, 134 Wash.2d 1, 10, 948 P.2d 1280 (1997). For example, an automobile passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding. State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999). Under Article I, Section 7, however, passengers are unconstitutionally detained when an officer requests identification "unless other circumstances give

the police independent cause to question [the] passengers." State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980).

As in Larson, Ms. Broeke was unlawfully seized when the police refused to return her purse to her. Her purse contained personal items that a person would not simply walk away from: her drivers license, her identification, her keys; her money, her cell phone, her cigarettes. The unlawful seizure was not cured by the officers telling Ms. Broeke that she was free to leave. To leave without her purse would have been to abandon essential personal property. Nor is the unlawful seizure cured by Ms. Broeke agreeing to be transported to her home by the police so that she can watch the service of a search warrant. When Ms. Broeke entered the police car, the police had still not given her purse. Once again, to not be transported by the police equated to abandonment of her person property. As the initial seizure of Ms. Broeke was improper, all evidence seized as a result of that seizure must be suppressed. State v. Larson, 93 Wn.2d 638, 645-646, 611 P.2d 771, 776 (Wash., 1980); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Here, the police exploited the illegality of Ms. Broeke's initial and continuing detention to

seize the evidence that she possessed methamphetamine with intent to deliver. The evidence of the possession with intent must be suppressed.

2. THE TRIAL COURT'S REFUSAL HOLD AN IN CAMERA INTERROGATION OF THE INFORMANT OR TO, ALTERNATIVELY, COMPEL THE STATE TO DISCLOSE THE NAME OF THE INFORMANT DENIED MS. BROEKE HER RIGHT TO COMPEL THE PRODUCTION OF WITNESSES AND TO ADEQUATELY DEFEND HER CASE.

The trial court erred in denying Ms. Broeke's request in the alternative: to either hold an in camera examination of the informant or to order the State to disclose the name of the informant. Pre-trial, Ms. Broeke established the required colorable need for the informant to be summoned as a witness. When the trial court denied Ms. Broeke's request, it deprived her of her Sixth Amendment right to summon witnesses and present a defense. As Ms. Broeke did not receive a fair trial, her convictions must be reversed.

The right to compel witnesses is guaranteed by the Sixth Amendment, which provides, among other things, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining

witnesses in his favor ”. State v. Smith, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984). These rights were recognized and applied to the states in Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). There, the Court described importance of the right:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, at 19, 87 S.Ct. at 1923.

Although guarded jealously, the right is not absolute. The Court's holding in Washington limits the right to compel witnesses to those witnesses who are material to the defense. In Washington, the Court found error because the defendant was denied access to a “witness who was physically and mentally capable of testifying to events that he had personally observed, and “ whose testimony would have been relevant and material to the defense.” Washington, at 23, 87 S.Ct. at 1925; Smith, 101 Wn.2d at 41-42. Accordingly, the defendant carries the burden of showing materiality. This burden has been described as establishing a colorable need for the person to be summoned. Ashley v. Wainwright, 639 F.2d 258 (5th Cir. 1981); Smith, 101 Wn.2d at 42.

Generally, the State is not required to disclose the identity of an informant providing information related to criminal activity. State v. Harris, 91 Wn.2d 145, 148, 588 P.2d 720 (1978). The purpose of the “informer's privilege” is to further effective law enforcement and to encourage citizens to report their knowledge of criminal activities. Roviaro, 353 U.S. at 59, 77 S.Ct. at 639; accord Harris, 91 Wn.2d at 148, 588 P.2d 720. In Washington, the privilege is codified at CrR 4.7(f)(2) and RCW 5.60.060(5). CrR 4.7(f)(2) provides (in part) as follows: “Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.” RCW 5.60.060(5) provides as follows: “A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.”

However, a defendant's request for disclosure of the informant's identity at trial implicates constitutional issues of fundamental fairness and due process. United States v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). When disclosure of a CI's identity is relevant and useful to the defendant, or if disclosure is essential to a fair determination

of the case, then disclosure is warranted. State v. Petrina, 73 Wn.App. 779, 783-84, 871 P.2d 637 (1994) (citing Roviaro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)). If the trial court finds that either prong of the Roviaro test (relevant and useful to the defense or essential to a fair determination of the case) has been satisfied, then fundamental fairness requires disclosure. Harris, 91 Wn.2d at 149, 588 P.2d 720; State v. Lusby, 105 Wn.App. 257, 262, 18 P.3d 625 (2001).

The trial court's decision to order or to refuse to order disclosure of an informant's identity is abuse of discretion. State v. Uhthoff, 45 Wn.App. 261, 268, 724 P.2d 1103, review denied, 107 Wn.2d 1017 (1986); see Harris, 91 Wn.2d at 152; State v. Bailey, 41 Wn.App. 724, 729, 706 P.2d 229 (1985). We also review for abuse of discretion the trial court's decision whether or not to hold an in camera hearing. State v. Vazquez, 66 Wn.App. 573, 582, 832 P.2d 883 (1992). A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons or when its decision is manifestly unreasonable. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In Petrina, 73 Wn. App. 779, this court held the trial court did not abuse its discretion when it ordered the State to disclose the name of an informant who provided information that formed the basis for a search warrant. In the affidavit for the search warrant, the unnamed informant

described how Petrina's adult son used Petrina's home as a "safe house" to store large quantities of marijuana and that Petrina was aware of his son's criminal enterprise. Id. at 781. The police served the warrant on Petrina's home locating marijuana and evidence of marijuana being packaged for sale. Id. at 782. Petrina was arrested and charged with possession of marijuana with intent to deliver. Petrina argued in his motion to disclose the name of the informant, that the informant was the only available witness to testify who put the marijuana in his house. Id. at 785. The trial court agreed and ordered the State to disclose the name of the informant. The Petrina court went on to note:

The Harris court also held that if it is clear to the trial court "in the first instance" that the defense has established either prong of the Roviaro standard (relevant and helpful to the defense or essential to a fair determination), fundamental fairness requires disclosure. 91 Wn.2d at 149, 588 P.2d 720. Failure to disclose when the defendant has established either Roviaro prong would prejudice the defendant, even if the trial court "believes the testimony could not benefit the accused.... [I]t does not matter whether the testimony of the informer would support the accused or not." Harris, 91 Wn.2d at 149, 588 P.2d 720. In such a situation, the accused decides how to use or whether to use the disclosed information. 91 Wn.2d at 149, 588 P.2d 720. The trial court cannot substitute its judgment for the defendant's as to the benefit of the testimony, or for the jury as to reliability of the testimony. Harris, 91 Wn.2d at 149-50, 588 P.2d 720.

Petrina, 73 Wn.App. at 784-785.

Ms. Broeke established both prongs of the Rovario test in her case. She proved that the informant's evidence would be both relevant and

helpful to the defense and essential to a fair determination. In the search warrant affidavit, the informant is identified as a frequent and recent guest to the home Ms. Broeke shared with Corona. The informant details multiple instances in a short period of time when he or she is in the house buying drugs from Corona. In her defense, Ms. Broeke denied knowing that Corona was a drug dealer or seeing any drug dealing type activity in the home. Instead of concealing methamphetamine in her vagina to the hide the drug from the police and protect it from seizure by the police and loss of revenue to Corona, Ms. Broeke testified that she was shocked when Corona gave her the large bag of methamphetamine and ordered her to hide it in her vagina or he would “kick her ass”. She had no idea he was a methamphetamine dealer up to that point. Corona testified that he concealed his drug dealing from Ms. Brooke. The informant was one person who could corroborate both Ms. Broeke and Corona’s testimony. When the informant was in Corona and Broeke’s home, neither of them would know that he or she would become an informant. So neither Corona nor Ms. Broeke had any incentive to act other than he or she normally would. Ms. Broeke denied having any knowledge of Corona’s drug dealings and the informant would have been able to testify to his observations of what was going on behind closed doors. In that respect,

the informant's anticipated testimony was both relevant and helpful to the defense and essential to a fair determination of the facts.

But instead of applying this analysis, the court injected its own take on the case:

What is interesting here is that – not that Mr. Corona is involved in a scheme to sell drugs, is the fact that Defendant became part of a possessory aspect with Mr. Corona and she intended to help conceal the drugs and deliver them back to Mr. Corona.

And that, to me, I think, complies with the intent and with the delivery. She concealed for the purpose of avoiding and was intending to deliver it back to Mr. Corona. And I think, just given those facts alone, what do we need the CI for? Okay.

1RP 176. But as noted above in Harris,

The trial court cannot substitute its judgment for the defendant's as to the benefit of the testimony, or for the jury as to reliability of the testimony. Harris, 91 Wn.2d at 149-50, 588 P.2d 720.

The trial court, in putting its own spin on the evidence, abused its discretion in denying her access to the informant and thereby denying her a defense. Her conviction should be reversed.

3. THE PARAPHERNALIA CONDITION CANNOT BE IMPOSED AND MUST BE STRICKEN FROM MS. BROEKE'S JUDGMENT AND SENTENCE.

The community custody condition that Ms. Broeke not possess or use paraphernalia must be stricken. It is not a legitimate crime-related condition and the term paraphernalia, as it is used, is too vague to be

properly enforced. Moreover, Ms. Broeke has not lost her right to challenge the paraphernalia condition by challenging it for the first time on appeal.

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

A sentencing court's application of the community custody conditions provisions of the Sentencing Reform Act is reviewed de novo. State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007). RCW 9.94A.700(5)(e)⁸ allows courts to impose "crime related prohibitions" as part of community custody. In State v. 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. State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008).

In Ms. Broeke'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.

⁸ Effective until August 1, 2009, then recodified at RCW 9.94B.050

CP 25. Similar to Zimmer, Ms. Broeke's judgment and sentence prohibits her from possessing things that "can be used" for drug related purposes, even if Ms. Broeke has no such intent. Virtually anything, even the most common household items can be "used for drug purposes." In Ms. Broeke's case, as in Zimmer, it is difficult to see how possession of things such as spoons, plastic baggies, boxes, matches, knives, or other random objects is crime related, unless the intent is to use these items for drug related purposes. As such, the drug paraphernalia provision in Ms. Broeke'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 constitutional.

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 25.

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 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 used waxed paper to wrap

her sandwiches? (Except waxed paper can also be used to make bindles, as can glossy pages out of magazines.) Perhaps Ms. Broeke will be in violation if she 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 Ms. Broeke open to violation at the whim of her 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 no. 827311). The following is from the petition for review and is offered to preserve this issue in Ms. Broeke’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 Ms. Broeke's case, her 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 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 Ms. Broeke's case, the conditions prohibiting her 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 Ms. Broeke’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 Ms. Broeke’s case, as in Bahl, this court’s refusal to adjudicate Ms. Broeke’s vagueness challenge would also cause the same hardship to Ms. Broeke 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 Ms. Broeke’s case her vagueness challenge 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 Ms. Broeke by the refusal to find her 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 Ms. Broeke her 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. Rheuark 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 Ms. Broeke'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.

E. CONCLUSION

Ms. Broeke respectfully requests that her case be remanded and the paraphernalia condition stricken from her judgment and sentence.

Respectfully submitted this 11th day of August 2009.



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