

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36264-0-II

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

STATE OF WASHINGTON,

Respondent,

vs.

BRENT C. MOORE,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it imposed a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited.

3. This court's refusal to address argument II as not ripe will violate the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a defendant's motion to suppress evidence if the police obtained that evidence in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if it imposes a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited?

3. Does the court of appeals' refusal to address a constitutional challenge to a community custody condition as not ripe for adjudication violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22?

STATEMENT OF THE CASE

On February 8, 2009, at about midnight, Clark County Deputies Jason Granneman and Eric Dunham were on routine patrol in the area of 105th Street and 59th Avenue in Clark County when they saw the defendant walking along the side of the road. RP 6-7, 17-19. The deputies were in a marked patrol vehicle and were in full uniform with firearms and utility belts. RP 24-27. They did not believe that the defendant had been or was involved in any criminal conduct and there had been no report of any crimes having been committed in that portion of the county. RP 12-14, 24-27. This intersection and the area around it is not in a high crime area. RP 31-32. In fact, Deputy Dunham was new to the Sheriff's office and was in his period of training. RP 6-7. As part of this training, the two deputies had discussed a department policy involving the number of "social" contacts that each deputy should make during each shift. *Id.* As a result, they decided to make a "social" contact on the defendant. *Id.*

As the patrol vehicle got up to the area in which the defendant was walking, Deputy Granneman directed a spotlight on the defendant, pulled the vehicle to a stop about 15 feet from the defendant's location and quickly exited. RP 8-10, 19-21. As he did this, the defendant turned away and put his right hand in his right pants pocket. *Id.* Seeing this as he exited the vehicle, Deputy Granneman put his right hand on his service weapon and

ordered the defendant to take his hand out of his pocket. *Id.* As he walked quickly up to the defendant's location, he saw the defendant take his hand out of his pocket and drop something on the ground next to him. *Id.* Once he got up to the defendant, Deputy Granneman frisked him for weapons, finding nothing. RP 17-23. He then had Deputy Dunham watch the defendant while he looked for the item that the defendant had dropped. *Id.* Within a few feet from the defendant, Deputy Granneman found a baggie with a small amount of methamphetamine in it. RP 22-23, 92-100. At this point, he placed the defendant under arrest for possession of methamphetamine. RP 22-23. The deputies also ran the defendant's name, which came back with a felony warrant. 8-10.

The Clark County Prosecutor later charged the defendant with possession of methamphetamine. CP 1. The defendant responded with a motion to suppress, arguing that the police had uncovered the contraband following their illegal detention of his person. CP 12-17. On April 15, 2009, the court held a hearing on the motion, with Deputies Dunham and Granneman and the defendant testifying. RP 1-36. Following this testimony and argument by counsel, the court denied the motion, although it found the issue a "close cases. RP 41-45. As of the date of this brief, the state had failed to propose any findings of fact or conclusions of law to the court to enter on the motion. CP 1-76.

Following the denial of the suppression motion, the case came on for trial with the state calling the two deputies as witnesses. RP 50, 66. The state also called a forensic scientist, who testified that the substance in the baggie the deputies seized contained methamphetamine. RP 92-100. The state then rested its case. CP 104. The defense then rested its case without calling any witnesses. CP 108. Following instruction and argument, the jury retired for deliberation and later returned a verdict of “guilty.” CP 35-49, 54.

The court later sentenced the defendant to a standard range sentence of 19 months in prison, along with 9 to 12 months of community custody. CP 57-74. The court also included a number of community custody conditions, including 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 transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling or data storage devices.

CP 64.

Following imposition of sentence, the defendant filed timely notice of appeal. CP 75-76.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a “reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) (emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392

U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point “the limited violation of individual privacy” is outweighed by the public’s “interests in crime prevention and detection” *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

In the case at bar, the state did not claim that the deputies had a reasonably articulable suspicion based upon objective facts sufficient to justify a detention of the defendant’s person. Indeed, they did not claim one, and the trial court specifically found that they did not. Rather, in the case at bar, the state argued, and the trial court found, that the deputies encounter with the defendant was a “social contact” that did not constitute a seizure of the defendant’s person under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. As the following explains, this findings was erroneous.

Not every encounter with the police is a seizure, and a police officer need not have a legal justification when merely approaching an individual in a public place and asking questions as long as a reasonable individual under the circumstances would feel free to walk away. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *State v. Menegar*, 114 Wn.2d 304, 787 P.2d 1347 (1990). Rather, under United

States Constitution, Fourth Amendment and Washington Constitution, Article 1, § 7, a seizure occurs when “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.” *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This is an objective standard, and the officer’s subjective suspicions and intent are irrelevant except as reflected in the officer’s actions. *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

The fact that a uniformed, armed police officer in a marked patrol vehicle stops next to a citizen on the street, gets out, approaches, and asks a question does not necessarily constitute a seizure, although it might under the right circumstances. *State v. O’Neill*, 148 Wn.2d at 574. In addition, the fact that the officer orders a person to remove his hands from his pockets, by itself, does not necessarily change a social contact into a seizure, although it might do so under the right circumstances. *State v. Nettles*, 70 Wn.App. 706, 855 P.2d 699 (1993). Rather, the ultimate issue is whether or not, under all of the facts and circumstances of the case, a reasonable person would have felt free to decline the officer’s request and terminate the encounter. *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997).

For example, in *State v. Nettles, supra*, a uniformed Seattle police officer pulled her marked patrol vehicle to the curb by the defendant and a

second person who were walking together on the street, got out, and said “Gentlemen, I’d like to speak with you, could you come to my car?” In response, the other person turned around and walked away. However, the defendant did walk up to her patrol vehicle. As he did, the officer ordered him to take his hands out of his pocket. He complied, and when he did, he took out a small bundle of drugs out of his pocket and threw it to the ground. The officer then arrested him for possession of those drugs.

The defendant later moved to suppress the contraband, arguing that the officer had illegally seized him when she asked him to walk over to talk to her and ordered him to take his hands out of his pockets. During his testimony in support of his motion to suppress, the defendant stated that he did not feel threatened by the officer, that he assumed she just wanted to talk, and that he did not think he was under arrest or that he was going to be arrested. When asked on re-direct examination why he didn’t just walk away, he replied that he had no reason to do so. Based upon the totality of these facts and circumstances and the defendant’s testimony, the trial court denied the motion to suppress. Following conviction, the defendant appealed, arguing that the trial court had erred when it denied the motion so suppress.

On appeal, the state argued that (1) under the facts of the case, there was no seizure, and (2) that even if there was a seizure, the defendant voluntarily abandoned the evidence the officer seized. The court first

addressed the second argument, noting that while the police may properly seize voluntarily abandoned property, such property is not voluntarily abandoned where the defendant shows (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment. *State v. Nettles*, 70 Wn.App. at 710 (citing *State v. Whitaker*, 58 Wn.App. 851, 853, 795 P.2d 182 (1990)). Thus, the question of involuntary abandonment would only arise if there was a seizure. In turning to this issue, the court found no seizure under the facts of the case. The court held the following on whether or not the officer's actions constituted a seizure under the facts and circumstances of the case.

We now turn to an analysis of the facts of this case. Officer Wong did not approach Nettles and his companion with either siren or patrol lights. When exiting her car she did not draw her gun. She addressed Nettles and his companion in a normal voice when requesting to speak with them. Until Nettles voluntarily discarded a plastic baggie of cocaine, Wong made no attempt to stop Nettles' companion, who continued to walk away after she asked to speak with both men. This alone is a forceful indication that neither individual was required to or felt compelled by the circumstances to stop. Officer Wong made no attempt to immobilize Nettles--she did not request and retain his identification and she did not direct him to place his person in any particular location or position, such as hands on the patrol car, that would have implied a loss of freedom to a reasonable person. There is nothing to indicate that he could not have declined to speak to her or approach her car.

Second, although not dispositive, nothing in the record indicates that Nettles himself perceived the encounter as other than permissive in nature.

State v. Nettles, 70 Wn.App. at 711.

The facts from the case at bar, when compared to the facts from *Nettles*, indicate that there was a seizure of the defendant's person prior to his abandonment of the baggie of contraband. First, in the case at bar, the encounter between the defendant and the deputies occurred on a dark county road at midnight with no one else present, unlike *Nettles*, which occurred on a city street, presumably with many people around. Second, in the case at bar, the deputies trained their spotlight on the defendant as they stopped, unlike *Nettles* in which the officer merely stopped her vehicle and got out. Third, in the case at bar, the officer immediately put his hand on his firearm in order to draw it as he exited the vehicle, unlike *Nettles*, in which the officer made no move toward her firearm. Fourth, in the case at bar, Deputy Granneman's first words to the defendant as he exited the patrol vehicle were an order to the defendant to take his hands out of his pocket, unlike *Nettles*, in which the officer's first words were a request that the two people come over and talk to her. Fifth, in the case at bar, the defendant's first actions upon seeing the deputies was to turn away, which action resulted in the command to take his hands out of his pockets, unlike *Nettles*, in which the defendant's companion turned around and walked away without the officer making any verbal attempt to prevent this action. Finally, in the case at bar, the defendant did not believe that he was free to leave the scene, unlike *Nettles*, in which the defendant testified that he thought he was free to leave.

The distinction of time, place, spotlight, hand on firearm, and immediate command distinguish this case from *Nettles*. Under the facts and circumstances of the case at bar, no reasonable person would believe that he or she would be free leave. Rather, a reasonable person would believe that he or she was being detained, as the defendant, in fact, did believe. Thus, in the case at bar, the trial court erred when it found that the defendant was not immediately detained for the purposes of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. This detention occurred prior to the time that he took the baggie of contraband out of his pocket and threw it to the ground.

Thus, the last issue is whether or not there was a causal nexus between the unlawful conduct of the deputies in seizing the defendant and the abandonment of the baggie of contraband. *State v. Nettles*, 70 Wn.App. at 710. This causal nexus is established if the facts indicate that the abandonment occurred in response to, or as a result of, the illegal police conduct, as opposed to some other reason. *State v. Whitaker*, 58 Wn.App. at 583. In the case at bar, there was no reason at all for the defendant to toss the baggie of contraband other than as a direct response to the deputy's order that he take his hands out of his pockets. Thus, in the case at bar, the abandonment was not voluntary. As a result, the trial court erred when it denied the defendant's motion to suppress.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT THE DEFENDANT ON NOTICE OF WHAT CONDUCT IT PROHIBITED.

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

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 Wash.2d at 263, 676 P.2d 996. 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*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

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

In the case at bar the defendant argues that the following community custody condition the court imposed in this case 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 or data storage devices.

CP 64.

In this provision 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 up to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and is 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 the defendant 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 the defendant 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, § 3 and United States Constitution, Fourteenth Amendment.

III. THIS COURT'S REFUSAL TO ADDRESS ARGUMENT II AS NOT RIPE WILL VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS THE DEFENDANT'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.

In *State v. Motter*, 139 Wn.App. 779, 162 P.3d 1190 (2007), this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In *Motter*, a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing "drug paraphernalia" which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter's challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous

items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

State v. Motter, No. 34251-2-II (filed 7-24-05).

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar this court violates the defendant's right to procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

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 Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *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, this 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)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, 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 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court.

This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

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 *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and 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.

This court's decision in *Motter* is in accord with the more recent decision in *State v. Valencia*, 148 Wn.App. 302, 198 P.3d 1065 (2009) (review granted). As the following points out, appellant argues that both of these decisions are in conflict with the Washington Supreme Court's decision in *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).

In *Bahl, supra*, the defendant appealed community custody conditions imposed following his conviction for second degree rape, arguing that they were void for vagueness. These conditions prohibited the defendant from possessing "pornographic materials" and "sexual stimulus material." The state responded, in part, that since the defendant was still in prison and DOC was not trying to enforce these conditions, the defendant'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, this 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.” This court held:

For many of the same reasons that the court held in *Loy* that the defendant there could bring his preenforcement vagueness challenge, we hold that a defendant may assert a preenforcement 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, preenforcement 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 preenforcement 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.

State v. Bahl, at 12.

This 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 an 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.

State v. Bahl, at 12-13.

In addressing these criteria in *Bahl*, this court had little difficulty in finding that the defendant's vagueness challenge was sufficiently ripe. Under the first two factors, the court found that the defendant'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 the defendant 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 the defendant's release would cause the defendant 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 to be an unconstitutional requirement. Thus, in *Bahl*, the court held that the

defendant's challenge to his community custody conditions was "ripe for determination."

In the case at bar, the defendant's challenge to one of his community custody conditions is also "ripe for determination" under the four factors recognized in *Bahl*. First, as in *Bahl*, the argument on the vagueness challenge is primarily legal in nature. Second, it is not necessary that DOC actually make a claim of a violation to create a factual setting in order to sufficiently narrow the legal question the court must address. Specifically, in *Bahl*, the defendant argued that the conditions prohibiting him from possessing "pornography" was vague because the term "pornography" was unconstitutionally vague. The court in *Bahl* found this to be primarily a legal question. Similarly, in the case at bar, the defendant argues that the condition prohibiting him from possessing 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 the case at bar, 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 defendants' respective sentences. Fourth, in *Bahl*, the court held that the refusal to adjudicate the defendant's vagueness challenge created significant

hardship because, upon release, the defendant would have to conform his conduct to meet what might well be ultimately held to be an unconstitutionally vague condition, and the defendant 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 the case at bar, as in *Bahl*, this court's refusal to adjudicate the defendant's vagueness challenge would also cause the same hardships to the defendant as such a failure to adjudicate would have caused the defendant in *Bahl*. Thus, in the same manner that the defendant's vagueness challenge in *Bahl* was ripe for consideration on direct review, so in the case at bar, the defendant's vagueness challenge to one of his community custody conditions is also ripe for consideration on direct review.

The error that this court committed in *Valencia* was that it set an additional condition beyond those set by this court in *Bahl*. In her dissent in *Valencia*, 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.

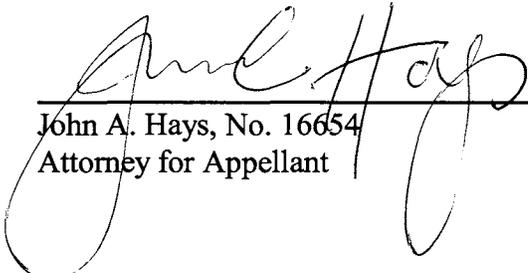
In fact, the harm that will accrue to the defendant in the case at bar by the refusal to find his vagueness argument ripe is far more insidious than that even recognized by Judge Van Deren in her dissent in *Valencia* because the failure to address the vagueness argument will deny the defendant his right due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as his right to full appellate review under Washington Constitution, Article 1, § 22, and his right to appointed counsel as an indigent under the Sixth Amendment, as the previous argument explained. Thus, this court should strike the vague community custody condition from the judgment and sentence in this case.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress because the police violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when they seized his person without legal justification. As a result, this court should reverse the defendant's conviction and remand with instructions to grant the motion to suppress. In the alternative, this court should order the trial court to strike the community custody condition identified herein as unconstitutionally vague.

DATED this 12th day of September, 2009.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

WAC 137-104-050

(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

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

