

NO. 39399-9-II

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

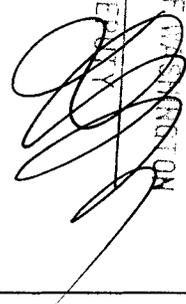
STATE OF WASHINGTON,

Respondent,

v.

JOANNE MARIE WHITE,

Appellant.

STATE OF WASHINGTON  
BY   
DEPUTY  
09 NOV 13 PM 12: 27

COURT OF APPEALS  
DIVISION II

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

The Honorable John P. Wulle, Judge

BRIEF OF APPELLANT

LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1396  
Longview, WA 98632  
(360) 425-8155

*P.M. 11-10-2009*

**TABLE OF CONTENTS**

Page

**A. ASSIGNMENTS OF ERROR..... 1**

**1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE SCHOOL BUS STOP ENHANCEMENT. .... 1**

**2. THE TRIAL COURT ERRED IN IMPOSING A 24-MONTH SCHOOL BUS STOP SENTENCING ENHANCEMENT ON MS. WHITE’S POSSESSION WITH INTENT TO DELIVER METHAMPHETAMINE CONVICTION..... 1**

**3. MS. WHITE WAS DEPRIVED OF EFFECTIVE COUNSEL WHEN HER ATTORNEY FAILED TO OBJECT TO HEARSAY STATEMENTS ABOUT THE SEARCH OF BASEMENT..... 1**

**4. BECAUSE MS. WHITE’S ATTORNEY WAS NOT EFFECTIVE, SHE DID NOT RECEIVE A FAIR TRIAL AS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS. .... 1**

**5. THE COMMUNITY CUSTODY CONDITION THAT MS. WHITE “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 (I) NOT CRIME-RELATED, AND (II) UNCONSTITUTIONALLY VAGUE. .... 1**

**6. ALTHOUGH UNCHALLENGED AT THE TRIAL COURT, THE DRUG PARAPHERNALIA CONDITION CAN BE CHALLENGED FOR THE FIRST TIME ON APPEAL.....1**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

**1. THE JURY RETURNED A VERDICT THAT MS. WHITE POSSESSED IN HER HOME METHAMPHETAMINE WITH INTENT TO DELIVER AND THAT HER HOME WAS WITHIN 1,000 FEET OF A SCHOOL BUS STOP. CONSEQUENTLY, THE TRIAL COURT ADDED A 24 MONTH SCHOOL ZONE ENHANCEMENT TO MS. WHITE'S SENTENCE. BUT THE STATE FAILED TO PRODUCE ANY EVIDENCE THAT ON THE DAY OF THE POSSESSION WITH INTENT, THERE WERE ANY SCHOOL BUS STOPS WITHIN 1,000 FEET OF MS. WHITE'S HOME. WITH NO SUCH EVIDENCE, CAN MS. WHITE'S SENTENCE BE ENHANCED? ..... 2**

**2. THE KEY ISSUES IN THE CASE AGAINST MS. WHITE WERE CREDIBILITY AND WHAT BEDROOM MS. WHITE LIVED IN. THE STATE ARGUED THAT SHE OCCUPIED THE SOUTHEAST BEDROOM ON THE THIRD FLOOR. MS. WHITE ARGUED THAT SHE LIVED IN THE BASEMENT. THE STATE ELICITED TESTIMONY FROM THE LEAD DETECTIVE THAT OTHER OFFICERS TOLD HIM THAT THEY FOUND NO EVIDENCE THAT MS. WHITE LIVED IN THE BASEMENT. DEFENSE COUNSEL DID NOT OBJECT TO THE HEARSAY. WHEN MS. WHITE'S CREDIBILITY WAS KEY TO THE CASE, WAS DEFENSE COUNSEL INEFFECTIVE BY FAILING TO CHALLENGE HEARSAY THAT UNDERMINED MS. WHITE'S CREDIBILITY? ..... 2**

**3. CRIME-RELATED PROHIBITIONS CAN BE IMPOSED ON A TERM OF COMMUNITY CUSTODY. MS. WHITE, WHO WAS CONVICTED OF POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELVIER, 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. WHITE DID NOT OBJECT TO THE CONDITION.....2**

**(A) IS THE PARAPHERNALIA CONDITION ACTUALLY CRIME RELATED WHEN VIRTUALLY ANYTHING CAN BE**

<b>POSSESSED OR USED FOR DRUG RELATED PURPOSES     EVEN IF MS. WHITE HAS NO SUCH INTENT?.....</b>	<b>3</b>
<b>(B) SHOULD THE PARAPHERNALIA CONDITION BE     STRICKEN BECAUSE IT IS UNCONSTITUTIONALLY     VAGUE? .....</b>	<b>3</b>
<b>(C) UNDER STATE V. BAHL CAN MS. WHITE     CHALLENGE THE PARAPHERNALIA CONDITION FOR     THE FIRST TIME ON APPEAL?.....</b>	<b>3</b>
<b>C. STATEMENT OF THE CASE.....</b>	<b>3</b>
<b>D. ARGUMENT .....</b>	<b>8</b>
<b>1. THERE IS NO EVIDENCE OF A SCHOOL BUS STOP     WITHIN 1,000 FEET OF MS. WHITE’S HOME AS OF THE     JUNE 11, 2008, INCIDENT DATE. ....</b>	<b>8</b>
<b>2. DEFENSE COUNSEL’S FAILURE TO OBJECT TO     HEARSAY TESTIMONY DEPRIVED MS. WHITE EFFECTIVE     COUNSEL. ....</b>	<b>12</b>
<b>3. THE PARAPHERNALIA CONDITION CANNOT BE     IMPOSED AND MUST BE STRICKEN FROM MS. WHITE’S     JUDGMENT AND SENTENCE.....</b>	<b>16</b>
<b>a. The paraphernalia condition is not a valid crime-related         prohibition .....</b>	<b>16</b>
<b>b. The paraphernalia condition is too vague to be         constitutional. ....</b>	<b>17</b>
<b>c. The paraphernalia condition can be challenged for the first         time on appeal.....</b>	<b>20</b>
<b>E. CONCLUSION.....</b>	<b>30</b>

## TABLE OF AUTHORITIES

Page

### Cases

<u>Adams v. United States ex rel. McCann</u> , 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942) .....	12
<u>Douglas v. California</u> , 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) .....	27
<u>Hi-Starr, Inc. v. Liquor Control Bd.</u> , 106 Wn.2d 455, 722 P.2d 808 (1986) .....	19
<u>In re Frampton</u> , 45 Wn.App. 554, 726 P.2d 486 (1986) .....	27
<u>In re Messmer</u> , 52 Wn.2d 510, 326 P.2d 1004 (1958).....	28
<u>In re Petrie</u> , 40 Wn.2d 809, 246 P.2d 465 (1952) .....	28
<u>Myrick v. Board of Pierce Cy. Comm'rs.</u> , 102 Wn.2d 698, 677 P.2d 140 (1984).....	18
<u>Rheuark v. Shaw</u> , 628 F.2d 297, 302 (5th Cir.1980), cert. denied, 450 U.S. 931, 101 S. Ct. 1392, 67 L. Ed. 2d 365 (1981) .....	27
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S. Ct 1029, 145 L. Ed. 2d 985 (2000).....	13
<u>Seattle v. Shepherd</u> , 93 Wn.2d 861, 613 P.2d 1158 (1980).....	18
<u>State v. Aver</u> , 109 Wn.2d 303, 745 P.2d 479 (1987).....	18, 19
<u>State v. Baeza</u> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	9
<u>State v. Bahl</u> , 164 Wn2d 739, 193 P.3d 678 (2008) .....	3, 20, 22, 23, 24, 25, 26
<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	28

<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	9
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	12, 14
<u>State v. Hennessey</u> , 80 Wn. App. 190, 907 P.3d 331 (1995).....	8
<u>State v. Maciolek</u> , 101 Wn.2d at 263, 676 P.2d 996 (1984) .....	18
<u>State v. Magee</u> , 143 Wn. App. 698, 180 P.3d 824 (2006) .....	15
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1998) .....	13
<u>State v. Miller</u> , 103 Wn.2d 792, 698 P.2d 554 (1985).....	18
<u>State v. Motter</u> , 139 Wn. App. 797, 162 P.3d 1190 (2007) .....	16, 26
<u>State v. Rupe</u> , 108 Wn.2d 734, 743 P.2d 210 (1987).....	27
<u>State v. Rutherford</u> , 63 Wn.2d 949, 389 P.2d 895 (1964) .....	27
<u>State v. Simpson</u> , 136 Wn. App. 812, 150 P.3d 1167 (2007).....	18
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003) .....	14
<u>State v. Valencia</u> , 148 Wn. App. 302, 198 P.3d 1065 (2009). 20, 25, 28, 29	
<u>State v. Worrell</u> , 111 Wn.2d 537, 761 P.2d 56 (1988).....	18
<u>State v. Zimmer</u> , 146 Wn. App. 405, 190 P.3d 121 (2008) .....	16, 17
<u>Steffel v. Thompson</u> , 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974).....	22
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12, 13
<u>United States v. Cronic</u> , 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).....	12, 13
<u>United States v. Loy</u> , 237 F.3d 251 (3d Cir. 2001).....	21, 22

<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).....	13
---	----

**Statutes**

RCW 69.50.401.....	8
RCW 69.50.435.....	8
RCW 9.94A.700(5)(e).....	16, 17

**Other Authorities**

CrR 3.5 .....	3
ER 803.....	15
RAP 2.2 .....	28
U.S. Const. Amend 6 .....	12
U.S. Const., Amend 14 .....	17, 20, 27, 28
WAC 137-104-050.....	29
WAC 137-104-080.....	29
Wash. Const. Art I, § 22.....	12
Wash. Const. Art I, Sec. 3 .....	17, 20, 26, 28

**A. ASSIGNMENTS OF ERROR**

- 1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE SCHOOL BUS STOP ENHANCEMENT.**
- 2. THE TRIAL COURT ERRED IN IMPOSING A 24-MONTH SCHOOL BUS STOP SENTENCING ENHANCEMENT ON MS. WHITE'S POSSESSION WITH INTENT TO DELIVER METHAMPHETAMINE CONVICTION.**
- 3. MS. WHITE WAS DEPRIVED OF EFFECTIVE COUNSEL WHEN HER ATTORNEY FAILED TO OBJECT TO HEARSAY STATEMENTS ABOUT THE SEARCH OF BASEMENT.**
- 4. BECAUSE MS. WHITE'S ATTORNEY WAS NOT EFFECTIVE, SHE DID NOT RECEIVE A FAIR TRIAL AS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.**
- 5. THE COMMUNITY CUSTODY CONDITION THAT MS. WHITE "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 (I) NOT CRIME-RELATED, AND (II) UNCONSTITUTIONALLY VAGUE.**
- 6. 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. THE JURY RETURNED A VERDICT THAT MS. WHITE POSSESSED IN HER HOME**

**METHAMPHETAMINE WITH INTENT TO DELIVER AND THAT HER HOME WAS WITHIN 1,000 FEET OF A SCHOOL BUS STOP. CONSEQUENTLY, THE TRIAL COURT ADDED A 24 MONTH SCHOOL ZONE ENHANCEMENT TO MS. WHITE'S SENTENCE. BUT THE STATE FAILED TO PRODUCE ANY EVIDENCE THAT ON THE DAY OF THE POSSESSION WITH INTENT, THERE WERE ANY SCHOOL BUS STOPS WITHIN 1,000 FEET OF MS. WHITE'S HOME. WITH NO SUCH EVIDENCE, CAN MS. WHITE'S SENTENCE BE ENHANCED?**

- 2. THE KEY ISSUES IN THE CASE AGAINST MS. WHITE WERE CREDIBILITY AND WHAT BEDROOM MS. WHITE LIVED IN. THE STATE ARGUED THAT SHE OCCUPIED THE SOUTHEAST BEDROOM ON THE THIRD FLOOR. MS. WHITE ARGUED THAT SHE LIVED IN THE BASEMENT. THE STATE ELICITED TESTIMONY FROM THE LEAD DETECTIVE THAT OTHER OFFICERS TOLD HIM THAT THEY FOUND NO EVIDENCE THAT MS. WHITE LIVED IN THE BASEMENT. DEFENSE COUNSEL DID NOT OBJECT TO THE HEARSAY. WHEN MS. WHITE'S CREDIBILITY WAS KEY TO THE CASE, WAS DEFENSE COUNSEL INEFFECTIVE BY FAILING TO CHALLENGE HEARSAY THAT UNDERMINED MS. WHITE'S CREDIBILITY?**
- 3. CRIME-RELATED PROHIBITIONS CAN BE IMPOSED ON A TERM OF COMMUNITY CUSTODY. MS. WHITE, WHO WAS CONVICTED OF POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELIVER, 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. WHITE 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. WHITE HAS NO SUCH INTENT?
- (B) SHOULD THE PARAPHERNALIA CONDITION BE STRICKEN BECAUSE IT IS UNCONSTITUTIONALLY VAGUE?
- (C) UNDER STATE V. BAHL<sup>1</sup> CAN MS. WHITE CHALLENGE THE PARAPHERNALIA CONDITION FOR THE FIRST TIME ON APPEAL?

**C. STATEMENT OF THE CASE**

On June 13, 2008, Joanne White lived in a three-level condominium (hereafter “condominium”) at 6101 NE 14<sup>th</sup> Court, Unit B, in Vancouver. RP<sup>2</sup> at 111. She was not the primary tenant. RP at 111. Instead, she rented the lowest level, the basement garage area, from the primary tenants, Zachary Davies and his girlfriend Kimberly Stanaker. RP at 111-113.

On June 13, Vancouver police officers and Department of Corrections officers (referred to herein generally as the “police”) arrived at

---

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

<sup>2</sup> “RP” in this instance refers to a single bound volume of the verbatim report of proceedings. On November 6, 2009, the transcriptionist prepared a second volume containing just a CrR 3.5 hearing. That second volume is not referenced in Appellant’s Brief.

the condominium with a search warrant.<sup>3</sup> RP at 2-4, 31-34, 47-48. The subject of the search warrant was Zachary Davies. RP at 42. When the police came in the door, Ms. White was on the landing of the third floor. RP at 34. The condominium's bedrooms are on the third floor with one exception. RP at 111. Ms. White made a suite for herself in the basement garage area. RP at RP at 112. Just before the police arrived with the warrant, Ms. White had settled into the upstairs southeast bedroom for an afternoon nap. RP at 118. On a couple of nights, Ms. White slept on a blow up mattress in that room because Zachary Davies was moving his computer equipment out of the basement at night. RP at 113-114.

The police searched the southeast bedroom. RP at 2-5, 50. During the search, the police found a wooden box in an armoire and a working scale near a computer. RP at 8, 40-41, 51, 114. The wooden box contained little plastic baggies and a used glass pipe. RP at 8. There were also a couple of drawers containing unused plastic baggies. RP at 41. Under the cushion of a chair, the police found a baggy containing 2.555 grams of methamphetamine. RP 20, 22, 25-26, 59-60. No fingerprint or DNA evidence was admitted at trial to show who might have handled or used the box, the pipe, or the baggies.

---

<sup>3</sup> The search warrant was never made a part of the record.

The only physical evidence that police found suggesting Ms. White used the southeast bedroom was Ms. White's purse. RP at 36-37. It was on the bedroom floor. Id. Found inside the purse was Ms. White's identification, \$386, a bank card, and an application to Clark College. RP at 38-39. Police Detective Gordon Conroy testified that Ms. White told him that the southeast bedroom was her bedroom. RP at 35. Ms. White denied saying that. RP at 118. Significantly, there was no bed in the bedroom. RP at 44-45. No witness testified to finding personal items in the bedroom – no appropriately sized women's clothing, no grooming products. RP at 44-45. Detective Conroy testified that Ms. White said the money in her purse was a college grant. RP at 37. Ms. White testified that it was a DSHS grant to help with her rent. RP at 123.

During the search, Zachary Davies was found in possession of methamphetamine and arrested. RP 42; CP 1. Because the police believed that Ms. White occupied the southeast bedroom, she was arrested for possession of methamphetamine with intent to deliver. CP 1. The State also charged Ms. White with possessing the methamphetamine with intent to deliver within 1,000 feet of a school bus stop. CP 1.

At trial, Ms. White presented testimony from her daughter and from a friend that they had both visited Ms. White several times in the condominium's basement that Ms. White had fashioned into an apartment.

RP at 86-89, 132-133. No State's witness testified to having personally searched the basement so the State did not rebut Ms. White's assertion that she lived in the basement apartment. Instead, without a hearsay objection from defense counsel, Detective Conroy testified that, as the lead officer, no other officer told him about evidence linking Ms. White to the basement. RP at 140.

At trial, the State proved that there were four school bus stops within 1,000 feet of the condominium. RP at 14-15, 66-68, 106-108. However, there was no testimony that any of the four bus stops existed on June 11, 2008. CP 63-69. (Also see attached Appendices A-C for complete testimony of Mr. Deitemeyer and Ms. Kidder.)

In closing argument, the prosecutor pitted Ms. White's credibility against Detective Conroy's credibility. The prosecutor told the jury that the single question they had to decide was which room was Ms. White's bedroom.

Possession means having substance in one's custody and control, may be either actual or constructive. In this case, no methamphetamine was found on her person so, therefore, we don't have actual possession in this case. We have constructive possession because it was found in her bedroom.

That's the State's theory of the case. Methamphetamine and all the material was found in her bedroom in the southeast corner bedroom. That's her bedroom, therefore, it has dominion and control. If you believe it's her bedroom, then she has dominion and control. If you don't believe it's her bedroom, then she didn't

have dominion and control. In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances of the case.

Whether the Defendant had the immediate ability to take actual possession of the substance, whether the Defendant had the capacity to exclude others from possession and whether the Defendant had actually had dominion and control over the premises. So it will turn on the credibility issue and we talked about this in voir dire, you are the sole judges of credibility. And that where this case is going to turn because one story is that that wasn't her bedroom and the State's allegation is that it was.

RP at 148-149.

The jury wrestled with Ms. White's fate for 5 hours before returning a guilty verdict on the both the possession with intent to deliver and the school bus stop enhancement. CP 19-20; RP at 170-171, 187.

The trial court sentenced Ms. White to 12 months on the possession with intent to deliver conviction plus an additional 24 months on the school bus stop enhancement. CP 23, 26; RP at 199-200. The court also imposed a term of 9-12 months of community custody with certain conditions to include,

∞ 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 26, 28.

At sentencing, Ms. White did not object to the above community custody condition. RP at 199-200.

Ms. White appeals all portions of her judgment and sentence. CP 38-58.

**D. ARGUMENT**

**1. THERE IS NO EVIDENCE OF A SCHOOL BUS STOP WITHIN 1,000 FEET OF MS. WHITE'S HOME AS OF THE JUNE 11, 2008, INCIDENT DATE.**

The evidence is insufficient to support the school bus stop enhancement. The State presented no evidence of any school bus stops within 1,000 feet of Ms. White's condominium as of the June 11, 2008, incident date. As the evidence is insufficient, the school bus stop enhancement must be reversed and dismissed.

The bus stop penalty is authorized by RCW 69.50.435 which provides in relevant part: "Any person who violates RCW 69.50.401 by... possessing with the intent to...deliver a controlled substance listed under RCW 69.50.401...within one thousand feet of a school bus stop route designated by the school district...may be punished by...imprisonment of up to twice the imprisonment otherwise authorized by this chapter[.]

It is the State's burden to prove each element of a sentence enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.3d 331 (1995). Evidence is sufficient to support a verdict

on an enhancement only if, when viewed in the light most favorable to the State, any rational trier of fact could have found the elements of the enhancement beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

In an effort to prove the school bus stop enhancement, the State called two witnesses. The first witness was Clark County GIS technician Matt Deitemeyer. Mr. Deitemeyer used the county's mapping software to print an aerial photo of the neighborhood around the condominium (6101 NE 14<sup>th</sup> Court, Unit B, Vancouver). At the prosecutor's request and by the prosecutor's specification, Mr. Deitemeyer enhanced the aerial photo with a few computer graphics. First, Mr. Deitemeyer added a red diamond to mark the condominium's location. Second, he added a purple school bus with a yellow windshield to mark the intersection nearest to the condominium. And third, he added a series of concentric yellow circles originating at the condominium as marked by the red diamond. (All of Mr. Deitemeyer's testimony is attached at Appendices A and C.<sup>4</sup>)

Cynthia Kidder, the assistant transportation manager for the Vancouver School District<sup>5</sup>, testified how the location of school bus stops

---

<sup>4</sup> The State called Mr. Deitemeyer twice. Appendix A is the verbatim record of his first testimony. Appendix C is the verbatim record of his second testimony.

<sup>5</sup> Ms. Kidder misspoke. Technically, the true name of the Vancouver School

are recorded on maps and are available for review on line or through the school district. (See her complete testimony attached as Appendix B.) She noted that because school bus stops change, the school district updates its central school bus stop map weekly and its mapping software daily. She looked at the aerial photo and identified the purple and yellow bus as the closest school bus stop to the condominium. She also identified 3 other school bus stops within the yellow concentric circles.

Mr. Deitemeyer used the county's mapping software program to measure the distance between the red diamond (condominium) and the purple and yellow bus (closest school bus stop to the condominium). It measured 135 feet. Mr. Deitemeyer also explained that each of the yellow concentric circles radiating out from the condominium measured a distance of 250 feet. All three of the other school bus stops identified by Ms. Kidder were within 1,000 feet of the condominium. RP at 67.

The incident Ms. White is charged with occurred on June 11, 2008. Ms. White's trial did not start until almost a year later, on June 1, 2009. Between the June 11, 2008, incident, and the June 1, 2009, trial, there was, for all intents and purposes, a whole new 9-month school year. On June 1, 2009, Ms. Kidder testified that she reviewed the school district's bus

---

District is the Evergreen School District.

stop mapping program only that morning before coming to court. RP at 66. She noted that school bus stops are not static and updates are made weekly to the school district's website and within 24 hours to the district's mapping software. RP at 65. Ms. Kidder made no representation that any school bus stops existed within 1,000 feet of the condominium on June 11, 2008.

Given Ms. Kidder's testimony, it cannot be said with any confidence that school bus stops in existence at the end of the 2007-2008 school year were the same as were in existence at the end of the 2008-2009 school year. The prosecutor should have asked Ms. Kidder if there were school bus stops within 1,000 feet of Ms. White's condominium on June 11, 2008. Instead, the prosecutor chose to ask Ms. Kidder if there were school bus stops within 1,000 feet of Ms. White's condominium as of June 1, 2009. The prosecutor's question leaves us to ask, "Were there any school bus stops within 1,000 feet of the condominium on June 11, 2008?" There is nothing in the record that answers the question. The State should not benefit from leaving us to merely guess. The State has failed to meet its burden. As the evidence is insufficient, this Court should reverse the school zone enhancement and remand for dismissal of the enhancement and resentencing.

**2. DEFENSE COUNSEL’S FAILURE TO OBJECT TO HEARSAY TESTIMONY DEPRIVED MS. WHITE EFFECTIVE COUNSEL.**

A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronig, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. Amend 6<sup>6</sup>; Wash. Const. Art I, § 22<sup>7</sup>. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to afford defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)).

An accused’s right to be represented by counsel is a fundamental component to our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented

---

<sup>6</sup> The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

<sup>7</sup> Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .”

by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudices the defense. Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct 1029, 145 L. Ed. 2d 985 (2000); see also, Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney's decisions are treated with deference, his acts must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required.

Hendrickson, 129 Wn.2d at 78. The defendant must demonstrate grounds to conclude a reasonable probability of a different outcome exists, but need not show the attorney's conduct altered the result of the case. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

As the prosecutor argued in closing, Ms. White's credibility was key. State witnesses testified that Ms. White occupied the upstairs southeast bedroom. That is where evidence of the possession of methamphetamine was found. The prosecutor challenged the jury: If they found Ms. White occupied the bedroom, she had dominion and control of the bedroom and all its contents and she was guilty. However, if Ms. White did not occupy the southeast bedroom, she did not have dominion and control of the items found in that bedroom and she was not guilty.

The only physical evidence that Ms. White occupied the southeast bedroom was the discovery of her purse on the floor. Detective Conroy testified that Ms. White told him she occupied the southeast bedroom. Ms. White testified that she did not say that. Instead, Ms. White said she occupied the basement. Two witnesses, Ms. White's daughter and a friend, testified that they had visited with Ms. White in her basement apartment. To save its case and to rebut these claims, the prosecutor called Detective Conroy as a rebuttal witness. Detective Conroy had not personally searched the basement. The prosecutor did not put on

testimony from any witness that had searched the basement. Instead, the prosecutor asked Detective Conroy, as the lead investigator, if any of the other searching officers told him about finding proof of Ms. White's basement occupancy. None had. Defense counsel did not object to this hearsay.

Thy jury deliberated on Ms. White's case for 5 hours. Obviously, the jury did just choose to believe Detective Conroy's word over Ms. White's word or they would have returned with a quick verdict. During those 5 hours, the jury must have given due consideration to all of the evidence. Hearing that none of the searching officers found evidence that Ms. White occupied the basement was, no doubt, critical in their determination of guilt. But the evidence was inadmissible hearsay that the jury should not have heard. Unless an exception applies, hearsay is inadmissible. State v. Magee, 143 Wn. App. 698, 180 P.3d 824 (2006); ER 803.

Given the evidence presented in the State's case, there was no tactical reason for defense counsel to fail to object to the damaging hearsay testimony from Detective Conroy. The evidence of possession with intent to deliver methamphetamine against Ms. White was slim at best. After 5 hours of deliberation, it is doubtful the jury would have returned with a guilty verdict without the damaging hearsay. Defense

counsel was ineffective for failing to object. Ms. White is entitled to a new trial with effective counsel.

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

The community custody condition that Ms. White 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. White 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)<sup>8</sup> 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

---

<sup>8</sup> Effective until August 1, 2009, then recodified at RCW 9.94B.050

committing the crime. State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008).

In Ms. White'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.

CP 28. Similar to Zimmer, Ms. White's judgment and sentence prohibits her from possessing things that "can be used" for drug related purposes, even if Ms. White has no such intent. Virtually anything, even the most common household items, can be "used for drug purposes." In Ms. White'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. White'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, § 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 Wn.2d 861, 865, 613 P.2d 1158 (1980); State v. 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 28.

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 Ms. White prohibited from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is Ms. White prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is Ms. White prohibited from using a blender? Matches are often used as a source of phosphorous

in the manufacture of methamphetamine. Is Ms. White prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. 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. White open to violation at the whim of her probation officer. Consequently, this condition is void and violates Ms. Whites’ right to due process under Washington Constitution, Article 1, § 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. White’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. Loy, at 260-61.

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 at 685.

In addressing these criteria, the Bahl court had little difficulty in finding Bahl’s vagueness challenge was sufficiently ripe. Bahl, 164 Wn.2d at 751. 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. Id. Under the third factor, the conditions Bahl challenged were “final” since they were made a part of the sentence imposed by the court. Bahl, 164

Wn.2d at 752. 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. Id. 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." Id.

In Ms. White'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. White'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. White'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. White's case, as in Bahl, this court's refusal to adjudicate Ms. White's vagueness challenge would also cause the same hardship to Ms. White 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. White'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. White 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. White 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. White'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 137-104-050.

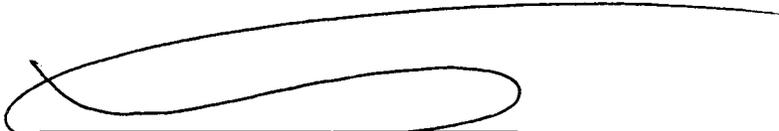
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in Valencia is to deny a defendant procedural due process under United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges 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**

Because Ms. White did not have effective counsel, she is entitled to a new trial. Alternatively, the school zone enhancement should be dismissed for insufficient evidence and her case remanded to the trial court for resentencing.. Finally, Ms. White respectfully requests that on remand, the paraphernalia condition stricken from her judgment and sentence.

Respectfully submitted this 10th day of November 2009.



---

LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

# APPENDIX A

## Testimony of Matt Deitemeyer

1 OFFICER SMITH: Thank you.

2 (WITNESS LEAVES THE STAND)

3 THE COURT: You may call your next witness.

4 MR. ST. CLAIR: Your Honor, the State calls GIS  
5 Technician Matt Deitemeyer.

6 THE COURT: Raise your right hand, please. Do you  
7 solemnly swear the testimony you're about to give will  
8 be the truth, the whole truth and nothing but the truth?

9 MR. DEITEMEYER: Yes.

10 THE COURT: Be seated here, sir.

11 (WITNESS TAKES THE STAND, 2:05)

12 THE COURT: And could I get you to state your name  
13 and spell your last name for the record?

14 MR. DEITEMEYER: Sure. Matt Deitemeyer, D-E-I-T-E-  
15 M-E-Y-E-R.

16 THE COURT: Your witness, Counsel.

17 MR. ST. CLAIR: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. ST. CLAIR:

20 Q Mr. Deitemeyer, what is your current occupation?

21 A Sure. I'm a GIS technician.

22 Q And who do you currently work for?

23 A For Clark County Department of Assessment and GIS, GIS  
24 being Geographic Information Systems.

25 Q And how long have you worked there?

1 A About seven years.

2 Q And what's your educational background prior to your  
3 being an employee of Clark County?

4 A Sure. I have a bachelor's degree in geography and a  
5 master's degree in geography, as well, from the  
6 University of Akron, Ohio.

7 Q And what are your specific day-to-day duties?

8 A Sure. All manner of map production, from spatial  
9 analysis to actual data entry of spatial features to  
10 farming data out over the web.

11 Q And how do you maintain your level of expertise?

12 A Sure. Throughout the years we go to relevant  
13 conferences, seminars and trade publications.

14 Q And were you asked to prepare a map for purpose of use  
15 in court today?

16 A Yes, I was.

17 Q And is computer software utilized in producing that kind  
18 of a map?

19 A Yes.

20 Q What computer software do you use?

21 A Sure. The software we use is from a company called  
22 ESRI, Environmental Systems Research Institute. It's  
23 based out of Redlands, California. We use the Arc GIS  
24 suite of software from them.

25 Q And how long ago was that software purchased for Clark

1 County?

2 A Sure. Initially it was purchased in about 1990 and it  
3 gets updated with versions and so forth almost annually  
4 since then.

5 Q So what is the current version, a 2008 update, 2009  
6 update?

7 A Nine point three dot one.

8 Q And how -- what was the most recent update, do you --

9 A That was -- I upgraded my computer about a month and a  
10 half ago.

11 Q Okay. And is that software considered to be reliable  
12 within the GIS community?

13 A Yes.

14 Q And what other local government agencies rely on that  
15 particular software across the state of Washington?

16 A Sure. Thurston County, King County all use it; Cowlitz  
17 County uses it, as well. Washington Department of  
18 Transportation, to name a few. I mean, the list would  
19 be huge.

20 Q Okay. And what kind of data does the Clark County GIS  
21 include?

22 A Well, we have anywhere from about 100 layers of data.  
23 Some of it's created in-house, other of it is given to  
24 us, like, from Public Utilities District, the CPU gives  
25 us data.

1 Q And when I ask, layers of data, what do you mean by  
2 layers of data anyway, like, to a lay person if you're  
3 describing how you put information on a map?

4 A Sure.

5 Q What's a layer of data?

6 A Sure. So out of these 100 layers you have, like, your  
7 road network, which is just a line, line data. You can  
8 also have zoning, the zoning layer, which would be  
9 polygons, you know, where it's, you know, an area within  
10 Clark County instead of a line feature. Also a point --  
11 you might have -- we have a building point layer, as  
12 well, which has, say, fire stations on it where there  
13 are individual points on a map stored as a point.

14 Q So really it's just the data that we're all used to  
15 seeing on a map, but you're pinpointing it a little bit  
16 more accurately?

17 A Well, certainly, once you have a hard copy map, you  
18 know, you're just seeing a sheet of paper in front of  
19 you. This is stored virtually in a computer database  
20 with coordinates, XY locations.

21 Q So you can choose whatever data you want to put in  
22 there?

23 A Yeah, you can mix and match those 100 layers however you  
24 want to make a really confusing map or a really nice  
25 map, too.

1 Q All right. And how was the map generated today?

2 A Map generated today was -- I was given a few loca --  
3 some location information. I found that location in our  
4 database. I then brought in the relevant information,  
5 specifically and most importantly, the base for the map,  
6 which was the aerial photography. Compos -- you know,  
7 put it into a layout form, added the ancillary  
8 information like title, legend, information relative to  
9 legend information and then sent it to our large  
10 printer, our large format plotter.

11 Q Okay. And does this item look familiar to you?

12 A Yes, it does.

13 (PERSON ENTERS COURTROOM)

14 Q And what is this?

15 THE COURT: Counsel, is that a witness?

16 MR. ST. CLAIR: No.

17 THE COURT: Okay. Go ahead.

18 Q And for the record, I'm showing the witness State's  
19 Exhibit 1.

20 A To answer your question, that's the map I made for court  
21 today.

22 Q And what would you say the accuracy is of this map?

23 A Sure. The aerial photography comes with a stated  
24 accuracy of plus or minus five feet.

25 Q Five feet?

1 A Five feet.

2 MR. ST. CLAIR: Your Honor, at this time the State  
3 would move to admit as an exhibit State's 1.

4 MR. ANDERSON: No objection.

5 THE COURT: 1's admitted.

6 MR. ST. CLAIR: Your Honor, no further questions  
7 for this witness at this time, but we will be recalling  
8 him at the completion of the State's case.

9 THE COURT: Okay.

10 MR. ANDERSON: No questions.

11 THE COURT: You may step down, sir.

12 (WITNESS LEAVES THE STAND)

13 THE COURT: You may call your next witness.

14 MR. ST. CLAIR: Can I see who's here, Your Honor?

15 Your Honor, there was -- I think we can probably  
16 move this along. We had -- I just forgot to discuss  
17 this, but we believe Defense has agreed that because  
18 we've stipulated to the admission of the photographs,  
19 that we don't need the deputy that took the photographs  
20 since that's all he would have been testifying to.

21 MR. ANDERSON: That's correct. We'll stipulate to  
22 the foundation for the photographs.

23 MR. ST. CLAIR: Then, Your Honor, I'm going to  
24 actually excuse -- one of our witnesses is a Deputy  
25 Clark County Sheriff -- well, he's a sergeant actually,

# APPENDIX B

## Testimony of Cynthia Kidder

1 THE COURT: Okay.

2 MR. ST. CLAIR: Yeah, I think that that should be  
3 fine, Your Honor.

4 MR. ANDERSON: Thank you.

5 MR. ST. CLAIR: I guess my hope would be that --  
6 this is Corporal Neil Martin's day off, so -- well,  
7 we'll get moving, we should be okay, I'm hoping.  
8 Because whereas my GIS witness could easily come back in  
9 the morning, I don't know about Corporal Martin, but see  
10 where we're at, so it'll be quick.

11 THE COURT: Okay.

12 (JURY PRESENT, 3:45)

13 THE COURT: Could I get you to rise and raise your  
14 right hand, please? Do you solemnly swear the testimony  
15 you're about to give will be the truth, the whole truth  
16 and nothing but the truth?

17 MS. KIDDER: I do.

18 THE COURT: Be seated.

19 (WITNESS TAKES THE STAND)

20 THE COURT: Please state your name and spell your  
21 last name for the record.

22 MS. KIDDER: Cynthia Kidder, K-I-D-D-E-R.

23 THE COURT: Your witness, Counsel.

24 MR. ST. CLAIR: Thank you, Your Honor.

25

## 1 DIRECT EXAMINATION

2 BY MR. ST. CLAIR:

3 Q Ms. Kidder, what is your current occupation?

4 A I am the assistant dispatcher in the transportation  
5 department for the Vancouver School District.6 Q Okay. And what are your duties as the assistant  
7 transportation manager?8 A I assist dispatch with phones, radios, driver questions,  
9 I help process route and stop changes, I enter student  
10 bus stop data into Excel, and I maintain the VersiTrans  
11 routing software and provide basic tech support for  
12 office staff.13 Q And how long have you worked for the Vancouver School  
14 District?15 A Over 12 and a half years, and I've been in  
16 transportation since July 1998.17 Q And as part of your duties, do you set the location of  
18 school bus stops for the Vancouver School District?19 A I do not. That responsibility lies with our safety  
20 officer, Candy Suder. She makes the final decisions and  
21 then she gives the information to dispatch and we  
22 process those changes.23 Q Okay. And how is it that the locations of those school  
24 bus stops are recorded?

25 A We record them in the Excel spreadsheet, which is also

1 linked to Access tables. And that information is  
2 available to everyone in the department, as well as to  
3 our planning office.

4 Q And do you also use something called Arc View?

5 A We do.

6 Q And what is Arc View?

7 A Arc View is a GIS mapping software. The planning office  
8 utilizes that, we don't in transportation.

9 Q Okay. And are there any other places that list the  
10 addresses of the bus stops?

11 A Yes, those are printed and distributed to all of the  
12 schools. They're also printed and distributed yearly in  
13 The Columbian's back-to-school report. They're also  
14 updated every week on the District's website.

15 Q Okay. Now, when someone calls regarding the location of  
16 a bus stop, how do you look that information up?

17 A We can --

18 Q What do you refer to?

19 A Well, we can look at the maps that are printed from our  
20 planning department based on the Arc View mapping  
21 software that they have. The maps all indicate the  
22 stops with little icons and we refer to those, and we  
23 also have a book that we maintain that has all of the  
24 stops listed, as well as individual route maps for each  
25 school.

1 Q And is this system in Arc View relied upon on a daily  
2 basis?

3 A Yes, it is.

4 Q And I think you've already mentioned that it is also  
5 kept up to date in the regular course of business?

6 A Yes, it is.

7 Q And when a school bus stop changes, is Arc View also  
8 updated?

9 A Yes.

10 Q And how soon after the time of the change do you usually  
11 update it?

12 A Within 24 hours.

13 Q And are the address lists for each of the bus stops also  
14 kept in the normal course of business for your school  
15 district?

16 A Yes, they are.

17 Q And prior to coming to court this morning, did you  
18 review the Arc View covering the area of 6106 Northeast  
19 14th Court, Vancouver, Washington?

20 A Yes, I did.

21 Q And based upon your viewing of Arc View, did you  
22 determine whether or not there are school bus stops  
23 designated by Vancouver School District in that area?

24 A Yes, I did.

25 Q And what was your conclusion?

- 1 A The map shows that there is one school stop at --
- 2 Q And for the record, you're referring to what we've got
- 3 as State's Exhibit 1, the map to your right?
- 4 A That is correct.
- 5 Q Okay.
- 6 A I was also able to locate three other stops that fall
- 7 within the radius.
- 8 Q Well, and to start off, could you please point to the
- 9 location of the bus stop closest to 6106 Northeast 14th
- 10 Court? And feel free to get up and point them all out.
- 11 A This would be this stop right here.
- 12 Q And how is that indicated on that map? Yeah, how is
- 13 it --
- 14 A By a bus.
- 15 Q A little bus icon?
- 16 A A little purple bus, uh-huh.
- 17 Q Okay.
- 18 MR. ST. CLAIR: And do we have a red pen, Whitney,
- 19 a little red pen?
- 20 Thank you, Your Honor.
- 21 THE COURT: Little button on the side there.
- 22 MS. KIDDER: Thank you.
- 23 Q And -
- 24 A That's a laser.
- 25 Q Oh, is that --

1 A Do you want me to mark it on here with a pen?

2 Q You know, I think we're going to be fine just with --

3 A Okay.

4 Q And furthermore in your -- when you viewed Arc View, did  
5 you actually find more stops than we have indicated on  
6 that map?

7 A Yes, there's a stop right here and that is Minnehaha and  
8 12th Avenue.

9 Q And just to be clear, you're indicating a point that  
10 seems closest to that second concentric circle?

11 A That's correct.

12 Q Okay.

13 A There is also a stop at Minnehaha and 11th Avenue, which  
14 is right here.

15 Q Okay. And that looks like it's just outside that third  
16 concentric circle; is that correct?

17 A That's correct.

18 Q Okay.

19 A And then there's a stop at 1005 Northeast Minnehaha,  
20 which is right there.

21 Q So just inside the last concentric circle?

22 A Correct.

23 Q And that little bus icon that is actually depicted on  
24 the map, is that an accurate representation of where you  
25 determined a bus stop to be?

1 A Yes, it is.

2 MR. ST. CLAIR: No further questions, Your Honor.

3 THE COURT: Cross?

4 MR. ANDERSON: No questions, Your Honor.

5 THE COURT: May the witness be excused?

6 MR. ST. CLAIR: Yes, Your Honor.

7 THE COURT: You're excused, ma'am. Thank you very  
8 much.

9 MS. KIDDER: Thank you.

10 (WITNESS LEAVES THE STAND)

11 THE COURT: You may call your next witness.

12 MR. ST. CLAIR: Yes, Your Honor, thank you.

13 THE COURT: Who are you going to call now?

14 MR. ST. CLAIR: Corporal Neil Martin, Your Honor.

15 THE COURT: Okay. Raise your right hand, please.

16 Do you solemnly swear the testimony you're about to give  
17 will be the truth, the whole truth and nothing but the  
18 truth?

19 CORPORAL MARTIN: Yes, sir, I do.

20 THE COURT: Be seated here, please.

21 (WITNESS TAKES THE STAND, 3:52)

22 THE COURT: Corporal, will you state your name and  
23 spell your last name for the record, please?

24 CORPORAL MARTIN: Yes, Neil Martin, M-A-R-T-I-N.

25 THE COURT: Your witness.

# APPENDIX C

## Testimony of Matt Deitemeyer con't

1 methamphetamine whether a person just bought it or  
2 whether they were just about to sell it?

3 A No.

4 MR. ANDERSON: Nothing further.

5 THE COURT: Redirect?

6 MR. ST. CLAIR: No, Your Honor.

7 THE COURT: May the witness be excused?

8 MR. ST. CLAIR: Yes, Your Honor.

9 THE COURT: You're excused. Could I ask you to  
10 give me the evidence, if you -- do you have it?

11 CORPORAL MARTIN: There's not any here.

12 THE COURT: Oh, it's over here now.

13 (WITNESS LEAVES THE STAND)

14 MR. ST. CLAIR: I was good this time, Your Honor,  
15 put it all back.

16 THE COURT: Okay. Didn't know if you left it over  
17 there or moved it. Okay. Counsel?

18 MR. ST. CLAIR: Your Honor, the State calls what we  
19 see as our last witness in our case in chief, which  
20 would be GIS Matt Deitemeyer.

21 THE COURT: Mr. Deitemeyer, I remind you, you're  
22 still under oath, sir.

23 MR. DEITEMEYER: Okay.

24 (WITNESS RESUMES THE STAND)

25 THE COURT: You may proceed.

1 MR. ST. CLAIR: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. ST. CLAIR:

4 Q Mr. Deitemeyer, I'm giving you a laser pointer. That's  
5 the dangerous end right there.

6 A Okay.

7 Q So use it as you need. Prior to coming to court --  
8 well, I guess, yesterday, did you research the area of  
9 6106 Northeast 14th Court, Vancouver, Washington?

10 A Yes, I did.

11 Q And is a bus stop location indicated on the map you  
12 created?

13 A Yes.

14 Q And how did you get the information for where that bus  
15 stop was?

16 A Sure. I was given the -- well, in this case, the  
17 intersection location from your office.

18 Q Okay. And how is that bus stop depicted on the map?

19 A Sure. Using the bus legend in the legend here, the bus  
20 with the yellow windshield, and it's depicted right  
21 here, there's one location depicted on the map.

22 Q And again, this is in fairly simple form, but would that  
23 be, you know, what you talked about, a layer of data  
24 that you've added to the map?

25 A Yes, I've added the point to the map, yes.

1 Q And have you also added the concentric circles to the  
2 map?

3 A Yes, I have.

4 Q So how do you determine the distance between the 6106  
5 Northeast 14th Court location and the bus stop?

6 A Sure. Well, it can be done a number of ways. I used  
7 Heads Up on the computer screen, a tool provided by the  
8 software discussed earlier where I simply selected the  
9 location, what I call the incident location, which is  
10 depicted as the red diamond, and then -- well, using the  
11 tool provided, clicking here and then clicking where the  
12 bus is placed as a graphic, and then the software  
13 provides me with a distance measurement in feet.

14 Q And based on your research, did you come to a conclusion  
15 as to the distance between the incident location and  
16 that bus stop?

17 A Yes.

18 Q And how many feet is that?

19 A It's approximately 135 feet.

20 Q And you said you created those concentric circles. What  
21 are they?

22 A Sure. The concentric circles are the yellow circles on  
23 the map. The point of origin for the radius is the  
24 incident location and they start at 250 feet and then  
25 they go out by adding 250 feet.

1           So the first one's 250 feet from the incident  
2           location, then it increases by 250, so this one would be  
3           500 feet from the incident location, 750 from the  
4           incident location and this is 1,000 feet from the  
5           incident location.

6           Q     So the furthest out concentric circle indicates 1,000  
7           feet out from the incident location?

8           A     That's correct.

9           MR. ST. CLAIR: No further questions, Your Honor.

10          THE COURT: Cross?

11          MR. ANDERSON: No cross, Your Honor.

12          THE COURT: May the witness be excused, gentlemen?

13          MR. ST. CLAIR: Yes, Your Honor.

14          THE COURT: You're excused, sir. Thank you.

15                               (WITNESS LEAVES THE STAND)

16          MR. ST. CLAIR: The State rests, Your Honor.

17          THE COURT: Okay. Mr. Anderson?

18          MR. ANDERSON: If I can step out into the hallway  
19          to see if my witness has arrived?

20          THE COURT: Sure.

21          MR. ANDERSON: Your Honor, my next witness has not  
22          arrived. I can put Ms. White on the stand, but she's  
23          requested ten minutes before testifying.

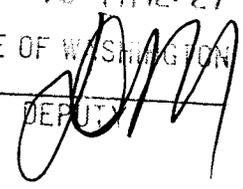
24          THE COURT: Fine. We'll give the jury ten minutes.  
25          We'll break, looking for a witness, folks. Rhonda,

FILED  
COURT OF APPEALS  
DIVISION II

09 NOV 13 PM 12:27

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY



CERTIFICATE OF MAILING

State of Washington, Respondent, v. Joanne Marie White, Appellant  
Court of Appeals No. 39399-9-II

I certify that I mailed Appellant's Brief to:

Michael C. Kinnie  
Clark County Prosecuting Attorney's Office  
P.O. Box 5000  
Vancouver, WA 98666-5000

and

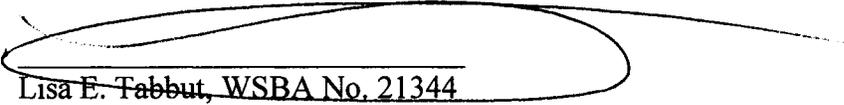
Ms. Joanne White  
5408 NE St. Johns RD.  
Vancouver, WA 98663

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 10, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on November 10, 2009.



Lisa E. Tabb, WSBA No. 21344  
Attorney for Appellant