

COURT OF APPEALS
DIVISION II

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NO. 40370-6-II

STATE OF WASHINGTON

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FERNANDO IRIZARRY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Fernando Irizarry was accused of violating community custody conditions and held in jail. He repeatedly objected to not having received a copy of the allegations against him. After six months of delay, the court held a violation hearing where the State claimed Irizarry violated six community custody conditions, even though the only notice in the court file mentioned three violations.

The court found Irizarry committed four community custody violations, but did not explain what standard of proof it used or enter written findings explaining the basis of the ruling. Irizarry did not receive constitutionally adequate notice of these four violations. The State did not prove he violated conditions that had been actually imposed on him, and for which Irizarry was aware he must comply. Consequently, Irizarry did not receive the basic due process rights before he can be punished for violating community custody.

B. ASSIGNMENTS OF ERROR.

1. The State provided Irizarry with inadequate notice of allegations of community custody violations required for provide due process of law.

2. The State did not prove Irizarry violated conditions of community custody for which he was given notice.

3. The court did not comply with the standard of proof and written findings required by the constitutional requirements of due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Before the court may revoke a person's community custody, the State must provide clear, advance, written notice of the alleged violations. Irizarry did not receive such notice for each allegation. Does it violate due process to punish Irizarry for violating conditions of community custody when he did not receive accurate advance notice of the legal and factual basis for the alleged violations?

2. The State must prove community custody violations by a preponderance of evidence and the court must enter written findings explaining the basis of the court's conclusions. The court did not file written findings that contained any factual findings and did not explain the standard of proof it applied. Did the lack of written findings and failure to use the necessary standard of proof deny Irizarry due process of law?

3. Did the State offer sufficient evidence to prove Irizarry violated conditions of community custody of which he had been apprised of in advance and which were authorized conditions of community custody?

D. STATEMENT OF THE CASE.

Irizarry pled guilty in 1998, and after serving his prison term, was ordered to serve three years of community custody. CP 9, 13. The court ordered specific conditions of community custody in the judgment and sentence. CP 13-14, 16. The judgment and sentence ordered no contact with the victim or her family, but did not have other no-contact requirements. CP 16. The judgment and sentence notified Irizarry of his obligation to register his address with the county sheriff, but it did not contain additional address notification and travel restrictions. CP 14, 16.

After serving his prison sentence and while on community custody, DOC accused Irizarry of violating the conditions of community custody. CP 20-23. DOC filed a petition alleging three community custody violations but Irizarry did not get a copy. CP 20-21.

Irizarry was arrested on July 28, 2009, and remained in jail pending the resolution of the alleged community custody.

8/14/09RP 5. Irizarry repeatedly objected to not having received notice of the allegations against him. 8/14/09RP 2, 4; 10/9/09RP 5, 7; 11/4/09RP 5. At the January 2010 hearing on the violations, the State claimed there were six alleged violations and the court found Irizarry had committed four of them. 1/22/10RP 37-39, 45.

At the January 22, 2010 hearing, Ane Black Crow and her daughter Morgan testified that they lived in a home in King County along with Morgan's child. 1/22/10RP 4-5, 10, 14. Ilesha Holley also lived in the home along with others. 1/22/10RP 5. Both testified that Irizarry visited Holley and spent the night in their home at times during May and June 2009. 1/22/10RP 5, 7, 16. Morgan Black Crow's child was present in the home at that time, although Irizarry had no specific contact or interaction with the child. 1/22/10RP 11, 17.

Community custody officer Pamela Bohan testified that Holley came to her office on July 27, 2009, and played Bohan messages that had been left on a cell phone. 1/22/10RP 21, 25. Bohan assumed the cell phone belonged to Holley and recognized Irizarry's voice. 1/22/10RP 22. Bohan did not have copies of the messages, but took notes as she listened. 1/22/10RP 22.

The messages included comments such as threatening to go to law enforcement and CPS if he did not meet Jose; “find out how much of a” mother f***** “I am”; “You better watch your back; if I catch you on the street, you’re done”; “Pressing charges, scamming, bullshit game. Ain’t coming back”; “You better run scared. You got an ass whooping coming”; “you better hope I don’t catch you on the street because if I do, you are in a world of hurt.” 1/22/10RP 22-23. Bohan said some of the messages were calmer than others and all were left in the course of one day. 1/22/10RP 23. His final message referred to a stolen pay check and said “that he was going to press charges.” 1/22/10RP 24.

Irizarry explained that he had been scammed by Holley and they had a falling out due to this scam that involved a false check. 1/22/10RP 26. He tried to present a copy of the check to the court but it was not admitted into evidence. 1/22/10RP 26-29. He tried to explain what Holley had told him, but the court sustained the State’s hearsay objections. 1/22/10RP 28-31. He testified that he was calling Holley about the check and was upset that he had been cheated. 1/22/10RP 31-32.

Holley did not testify and had not responded to Bohan’s efforts to contact her after this meeting. 1/22/10RP 34-35. Bohan

admitted Holley had a warrant for her arrest regarding a theft-related crime. 1/22/10RP 35-36. The prosecutor admitted that he had been trying to contact Holley at all possible addresses but had not reached her. 12/11/09RP 5.

The court found Irizarry violated community custody by having contact with minors, failing to tell DOC of his residence, leaving Pierce County without permission from his community custody officer, and failing to obey all laws by threatening Holley. 1/22/10RP 42-45; CP 25-26. The court sanctioned Irizarry 180 days for the violations. 1/22/10RP 45; CP 26.

E. ARGUMENT.

1. WHERE IRIZARRY DID NOT RECEIVE WRITTEN NOTICE OF THE ALLEGED VIOLATIONS OF COMMUNITY CUSTODY, AND THE STATE DID NOT PROVE HE VIOLATED VALIDLY IMPOSED CONDITIONS, HE WAS DENIED DUE PROCESS OF LAW

- a. Due process requires meaningful, specific notice of allegations before a parole revocation. A person facing the revocation of his freedom to live in the community due to an allegation that he violated conditions of community custody must receive due process of law. Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)); In re Personal

Restraint of Blackburn, 168 Wn.2d 881, 884, 232 P.3d 1091 (2010); U.S. Const. amend. 14 (no state shall “deprive any person of life, liberty, or property, without due process of law”); Const. art. I, section 3.

The Supreme Court recently explained the type of notice necessary to meet the “minimum requirements of due process” for revoking a person’s community custody. Blackburn, 168 Wn.2d at 884. “[W]ritten notice of the claimed violations” must precede a hearing, along with “advance disclosure of the State’s evidence, an ‘opportunity to be heard in person and to present witnesses and documentary evidence,’ ‘the right to confront and cross-examine adverse witnesses,’ a neutral and detached’ adjudicator, and a written statement by the fact finder of the evidence relied on and the reasons for the final decision.” Blackburn, 168 Wn.2d at 884 (quoting Morrissey, 408 U.S. at 488-89).

This “written notice” must “inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.” Id. (quoting State v. Dahl, 139 Wn.2d 678, 685, 990 P.2d 396 (1999)). To satisfy the core concerns of due process, constitutionally adequate notice requires the State to let the accused person “know DOC’s legal theory in order to prepare

an adequate defense.” Id. Preparing a defense hinges on the legal basis of an allegation, and therefore, when accused of failing to obey the law, the accused person must know the “particular definition of the crime that he or she allegedly committed,” in order to defend against the allegation. Id. at 886.

When a person is accused of violating an “obey all laws” condition of community custody, notice should include the statutory and nonstatutory essential elements of the law allegedly violated. Id. at 866. Citing to the specific statute lets the defendant “isolate the various elements of the crime and present facts in his defense,” although the notice must also include pertinent nonstatutory elements if those exist. Id.

b. Irizarry did not receive mandatory written notice of the alleged community custody violations. Blackburn holds that written, advance notice is mandatory, and serves as a “core” due process protection. 168 Wn.2d at 884.

Irizarry did not receive advance, written notice of all alleged violations. Whatever notice he received came after substantial confinement. He was detained in jail for violating community custody on July 29, 2009. CP 22-23. He complained at hearings held on August 14, October 9, and November 4, 2009, that he still

had not received notice of the violations against him. 8/14/09RP 2, 4; 10/9/09RP 5, 7; 11/4/09RP 5.

The only notice filed with the court is one attached to a petition entered on August 14, 2009, more than two weeks after Irizarry's arrest and detention. CP 20-23. This notice accuses Irizarry of three violations. CP 20-21. Yet at the hearing on whether Irizarry violated conditions of community custody, the court mentioned six alleged violations and found Irizarry committed four violations. 1/22/10RP 37-39, 45.

The record contains no evidence that Irizarry received written notice of the six alleged violations for which he was tried and punished. This Court cannot assess the constitutional adequacy of Irizarry's notice when the trial court file does not contain any copy of the violations the State alleged. The lack of complete, advance, written notice for each allegation violates due process. Morrissey, 408 U.S. at 488-89; Blackburn, 168 Wn.2d at 884.

c. Irizarry did not receive constitutionally adequate notice regarding an allegation of harassment. The court found Irizarry violated his community custody by failing to obey all laws, "by making threats to Iesha Holley." CP 25. An accusation of

failing to obey all laws by threatening another person requires specific notice of the statutory and nonstatutory elements of the predicate statutory offense. Blackburn, 168 Wn.2d at 886-87.

In Blackburn, DOC alleged the offender violated community custody by failing “to obey all laws: specifically, threatening to kill Shelly Blackburn on or about 5/14/08.” 168 Wn.2d at 882. The Supreme Court ruled that this notice was inadequate and violated Blackburn’s due process right to notice.

DOC’s notice to Blackburn was inadequate because “the notice did not state which law he failed to obey.” Id. at 887 (emphasis in original). By never explaining the law Blackburn failed to obey, “several risks were unnecessarily created.” Id. First, DOC “was left free to pursue alternative legal theories at the hearing.” Id. Second, the court could base its decision on an unconstitutional subsection, which in fact occurred in Blackburn.¹ Id. Third, the lack of specific notice may have made Blackburn “uncertain about the law for which he had to prepare a defense.” Id. In sum, due process requires advance notice that either cites the relevant statute or states the elements of the offense, including any

nonstatutory elements that would render the offender's conduct unlawful. Id.

The August 14, 2009 petition does not mention this violation regarding threatening Holley. CP 20-21. Thus, the record contains no evidence that DOC gave Irizarry the necessary notice of the statute it accused him of failing to obey. No written notice specified the threats at issue. No notice document set forth the essential elements of the offense, and no pleading ensured Irizarry was being accused of violating a constitutionally valid section of the harassment statute. "An offender whose liberty is in jeopardy should not be misled, subjected to guessing games, or asked to hit a moving target." Blackburn, 168 Wn.2d at 886.

A person is guilty of harassment if he knowingly threatens to cause bodily injury immediately or in the future to the person threatened and the person's words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.42.020(1). Only "true threats" are prohibited, which are the statements that a reasonable person would foresee as "a serious expression of intention to inflict bodily harm upon or to take

¹ One subsection of the harassment statute has been declared unconstitutional. State v. Williams, 144 Wn.2d 197, 210-11, 26 P.3d 890 (2001); RCW 9A.46.020(1)(a)(iv). The hearing officer in Blackburn originally relied on

the life of another.” State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Assuming *arguendo* that the State had alleged Irizarry threatened another person, as the court indicated in its finding a violation of community custody, such a threat is not a violation of the law unless it is a “true threat,” the nature of a threat is one of bodily injury, and the person threatened was placed in reasonable fear this threat would be carried out. Kilburn, 151 Wn.2d at 43. The court did not find Irizarry’s words satisfied these elements. See Blackburn, 168 Wn.2d at 886. It merely found Irizarry’s words were not justified. 1/22/10RP 44. Consequently, in addition to the lack of notice, the State did not prove Irizarry failed to obey the law in using threatening language toward Holley.

“For purposes of minimal due process, proper notice must set forth all alleged parole violations so that a defendant has the opportunity to marshal the facts in his defense.” Dahl, 139 Wn.2d at 684. Irizarry did not receive constitutionally adequate notice of the allegation that he failed to obey the laws by threatening Holley. Additionally, the State did not prove that he violated a specific law

that unconstitutional subsection. Blackburn, 168 Wn.2d at 886.

by using threatening words, which is a necessary element of failing to “obey all laws.” Blackburn, 168 Wn.2d at 886.

d. Irizarry did not receive required notice of the conditions of community custody he was accused of violating. The court found Irizarry violated three additional conditions of community custody. CP 25. One of these violations was not listed in the original, and only, document providing notice of the alleged violations. CP 20-21. Furthermore, there is nothing in the record demonstrating that Irizarry had been informed that he must abide by any of these conditions, and these violations were not proven.

i. Irizarry did not violate community custody by failing to give his address to his community custody officer. The court found Irizarry violated conditions of community custody by “failing to comply with address notification to community corrections officer.” CP 25. The petition for noncompliance did not include this allegation, but instead alleged that Irizarry “has failed to obey all laws by failing to correctly register his address from January 2009 until May 31, 2009.” CP 21.

At the violation hearing, the prosecutor said he was “not going to pursue Violation No. 2, the failure to register charge.” 1/22/10RP 37. Instead, he asked the court to find Irizarry failed to

comply with address requirements. Because the written notice of allegations only mentioned that Irizarry failed “to correctly register his address,” Irizarry did not receive valid notice that he was being accused of failing to report his address to his community custody officer, and this lack of notice violates due process. Morrissey, 408 U.S. at 488-89; Blackburn, 168 Wn.2d at 884.

Additionally, the timeframe for the failure to register allegation ended May 31, 2009. Ane Black Crow recalled Irizarry staying at her home intermittently in June and July 2009. 1/22/09RP 5, 8. Although she said Irizarry could have been at her house in May 2009, the court never expressly found that Irizarry had been living in the Black Crow home in May, as the violation alleged. It violates due process to punish Irizarry for conduct outside the timeframe of the allegation. Blackburn, 168 Wn.2d at 884-86 (“An offender whose liberty is in jeopardy should not be misled, subjected to guessing games, or asked to hit a moving target.”). The court’s failure to find when Irizarry violated this purported condition denied him due process of law.

Furthermore, Irizarry was not living at the Black Crow home, but temporarily visiting. Irizarry was staying at the home for a few days at a time, in the course of dating Holley. DOC did not prove

that temporarily staying at another person's house qualified as a residence for which address notification is required.

A residence is considered to be a place where person intends to return as a dwelling place, "as distinguished from a temporary sojourn or transient visit." State v. Pray, 96 Wn.App. 25, 29, 980 P.2d 240 (1999) (citing Webster's Third New Int'l Dictionary, at 1931 (1969)). When a person does not know exactly where and whether he will be permitted to sleep in a certain location, he does not have a fixed residence. State v. Pickett, 95 Wn.App. 475, 476, 975 P.2d 854 (1999).

Ane Black Crow owned the Auburn home where Irizarry stayed temporarily in 2009. 1/22/10RP 5-6. She only knew him for a couple of weeks. Id. Irizarry came late one Friday and stayed for the weekend. 1/22/10RP 6. He stayed at her home for a number of nights over a two week period, on two occasions, but he was in and out: "Like, he would be there sometimes and then he would be gone, but he was kind of around and then the break time, then we didn't see him at all." 1/22/10RP 6-7. She did not know exactly how often he stayed the night during those two periods of time. 1/22/10RP 7. The State did not prove the Black Crow home served as a residence for which Irizarry was required to notify DOC.

Also, the judgment and sentence does not require Irizarry to give notice of his address to DOC while on community custody. CP 9-19. The State did not prove this Auburn home was his address or residence during the charging period of January through May 2009. The address registration requirement listed in the judgment and sentence obligates him to inform the county sheriff of his address, not DOC, and the prosecutor did not pursue the alleged violation that he failed to register. 1/22/10RP 37. The State failed to provide notice and sufficient proof that Irizarry violated a condition of community custody by temporarily spending the night at another person's home. Blackburn, 168 Wn.2d at 884.

ii. Irizarry did not violate community custody by having contact with a minor. Irizarry was accused of having contact with minors, in violation of a community condition imposed by DOC. CP 20. But the judgment and sentence does not impose this condition of no contact with any minors. CP 9-19. Irizarry's judgment and sentence only apprises Irizarry that he could not have contact "with the victim K.S. or her family." CP 16.

The judgment and sentence does not authorize DOC to impose additional conditions. CP 9-19. There was no evidence Irizarry was informed that he had to comply with this condition.

Therefore, it violates due process to punish Irizarry for failing to comply with this broad no contact prohibition in the absence of evidence he was notified of this condition.

iii. Irizarry did not violate community custody by leaving the county. The court found Irizarry violated community custody by failing to obtain permission from DOC before leaving the confines of Pierce County. CP 25. This condition does not appear on his judgment and sentence. CP 14-16. The State did not establish when Irizarry was apprised of this mandatory condition. The notice pleading does not explain the source of this requirement. It only alleges that Irizarry “left Pierce County and travelled to King County multiple times since January 2009.” CP 21. The petition for noncompliance claims that these “acts and deeds were in direct violation of the terms and conditions of the aforementioned sentence.” CP 20-21. But the judgment and sentence does not impose the requirement that Irizarry may never leave Pierce County. CP 9-19. Accordingly, Irizarry could not have violated his sentence by leaving the county.

e. Due process requires proof of the violations by a preponderance of evidence and written findings by the court. In addition to the requirements of meaningful advance written notice

of claimed violations of community custody, due process requires the State to prove the violation by a preponderance of evidence. Morrissey, 408 U.S. at 488-89. It also mandates the court to enter substantive, explanatory written findings. Id. As held in Morrissey and reaffirmed in Blackburn, the presiding neutral magistrate must provide a “written statement” containing “the evidence relied on and the reasons for the final decision.” Blackburn, 168 Wn.2d at 884 (quoting Morrissey, 408 U.S. at 488-89).

The court’s order modifying sentence does not set forth the standard of review the court applied. CP 25-26. Nor does the court’s oral ruling mention of what burden of proof the court applied. 1/22/10RP 43-45.

The court’s written order does not explain the evidence relied on and the reasons for the court’s decision, as expressly required by Morrissey. CP 25-26. The court’s order sets out four violations it found Irizarry committed but does not say what facts it found to support the violations. It offers no reasoning for its decision.

As the Supreme Court recently explained in Blackburn, there are valid and important reasons for the due process requirements attendant to community custody violation hearings. It is important

that the accused understand the precise factual and legal nature of the charges, so he or she may try to defend against them. 168 Wn.2d at 884-86. It is necessary for the State to prove the allegations to a neutral magistrate and the judge must base its decision on the violations alleged. In Blackburn, the court relied on an unconstitutional subsection of the harassment statute because the State had not given specific notice of the provision of that statute it claimed Blackburn violated. Id. at 886. The court may have done the same here. Where the court never explained the factual and legal basis of its decision, the court did not comply with the due process requirements necessary before imposing punishment and denying a person his liberty due to a community custody violation.

2. IRIZARRY IS ENTITLED TO RELIEF EVEN
THOUGH HIS SERVED THE VIOLATION
SANCTION IMPOSED.

Because of extraordinary delay in the prosecution of the community custody violation allegations in this case, by the time the court imposed a 180 day sentence for violations, Irizarry had already served 178 days in jail. Yet, meaningful relief remains available to Irizarry. According to the prosecution, his present term of community custody does not expire until October 26, 2011, and

this may be extended due to tolling that occurred while Irizarry was in jail. 11/4/09RP 5.

The possibility of potential future consequences, such as the effect an issue may have on a future sentencing judge, renders an appeal not moot even when the express relief sought is no longer available. Monohan v. Burdman, 84 Wn.2d 922, 925, 530 P.2d 334 (1975). The petitioner in Monohan challenged the prison's early release calculation but he had been paroled by the time the court reviewed his case. The court found the issue was not moot because the initial decision regarding eligibility for early release could impact future release hearings or even subsequent sentencing determinations in the event he was arrested for another crime. Id.

Irizarry is presently serving community custody, and his community custody was extended due to the violation sanctions imposed, so the issues presented are not moot. The fact of prior violations could be used against him if future violations are alleged or in deciding eligibility for release from community custody obligations.

Finally, even if the Court finds the case is moot and no meaningful relief is available to Irizarry, this case presents an issue

of continuing and substantial public importance. State v. Sansone, 127 Wn.App. 630, 636-37, 111 P.3d 1251 (2005) (addressing criteria for considering a case even if technically moot). The court's failure to accord Irizarry basic due process in providing adequate notice, entering written findings, clarifying the standard of proof applied, and requiring sufficient evidence is not only capable of meaningful relief, but also demonstrates the need for review and guidance to the courts and parties involved in such cases.

F. CONCLUSION.

For the reasons stated above, Mr. Irizarry respectfully asks this Court to find the order punishing him for violating community custody violated due process of law.

DATED this 13th day of December 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 40370-6-II
v.)	
)	
FERNANDO IRIZARRY,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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