

NO. 43073-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

GEOVANI TRUJILLO,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found appellant had the current or future ability to pay legal financial obligations.

2. The court acted outside its authority in imposing community custody conditions that are not crime related.

3. The judgment and sentence incorrectly indicates that appellant was convicted of a serious violent offense.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay LFOs?

2. Did the court act outside its authority in prohibiting appellant from accessing the internet, computers in general, as well as social networking sites, where there was no allegation computers or web sites contributed to the offenses?

3. Did the court act outside its authority in ordering appellant to obtain a substance abuse evaluation where there was no allegation drugs or alcohol contributed to the offenses?

4. Should this Court should remand to correct a scrivener's error on the judgment and sentence indicating that appellant was convicted of a "serious violent offense?"

B. STATEMENT OF THE CASE<sup>1</sup>

On May 27, 2010, the Pierce county prosecutor charged appellant Geovani Hayward Trujillo with six counts of second degree child molestation allegedly committed between June 1, 2009, and March 31, 2010. CP 1-4. Pursuant to a plea agreement entered on October 3, 2011, Trujillo pled to four counts, one for each of the three complainants, plus one count allegedly committed against all three:

That Geovani Gohan Hayward Trujillo, in the State of Washington, during the period between the 1<sup>st</sup> day of June, 2009 and the 31<sup>st</sup> day of March, 2010, did unlawfully and feloniously, being at least 36 months older than A.M.L. and S.A.G. and L.R.W., have sexual contact with A.M.L. and S.A.G. and L.R.W., who is at least 12 years old but less than 14 years old, and not married to the defendant and not in a state registered domestic partnership with the defendant, contrary to RCW 9A.44.086, and against the peace and dignity of the State of Washington.

CP 12.

In the Statement of Defendant on Plea of Guilty, Trujillo acknowledged:

In the State of Washington, during the period of 6/1/09 and 3/31/10, I being at least 36 months older, had sexual contact with my stepdaughter and her friends (LRW, AML and SAG). The girls were between 12 & 14 years of age.

CP 22.

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<sup>1</sup> The report of proceedings from the plea and sentencing hearings is contained in one bound volume, consecutively paginated, referred to as "RP."

Trujillo had no prior criminal history, but stipulated he had an offender score of 9 points, based on the “other current offenses” for each count, yielding a standard range of 87-116 months of incarceration. CP 26-28.

At sentencing on January 25, 2012, the prosecutor and defense counsel made a joint recommendation for a special sex offender sentencing alternative. RP 11-12, 16-17. The court rejected the recommendation, however, on grounds Trujillo violated the conditions of his pre-trial release and was therefore not a good candidate for community based treatment. RP 22-26.

The court sentenced Trujillo to 105 months, plus 36 months of community custody. CP 41. As conditions of community custody, the court required, inter alia:

You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the Court. You also are prohibited from joining or perusing any public social websites (Face book My Space etc).

Obtain a Substance Abuse Evaluation ... and comply with any/all treatment recommendations.

CP 55.

The court also imposed \$1,200.00 of legal financial obligations. CP 39. Although there was no discussion of Trujillo’s financial

circumstances (see RP 23-24), the judgment and sentence made a written finding, which was pre-printed on the sentencing form:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 38 (Section 2.5). Trujillo timely appeals. CP 63-80.

C. ARGUMENT

1. THE COURT ERRED WHEN IT FOUND WITHOUT EVIDENCE TRUJILLO HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). This Court reviews the trial court's decision on ability to pay under the clearly erroneous standard. Bertrand, 165 Wn. App. at 403-04. This error may be raised for the first time on appeal. Bertrand, at 394.

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered

the defendant's financial resources and the nature of the burden imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's finding that Trujillo has the present or future ability to pay his LFOs. Accordingly, the court's finding in this regard was clearly erroneous and should be stricken. See Bertrand, 165 Wn. App. at 405. Before the State can collect LFOs in this case, moreover, there must be a properly supported, individualized judicial determination that Trujillo has the ability to pay.

2. THE TRIAL COURT ERRED IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY THAT ARE NOT CRIME-RELATED.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001). An accused has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998); see Bahl, 164 Wn.2d at 750-52 (accused may bring pre-enforcement challenge to vague sentencing condition).

Trujillo was convicted of second degree child molestation, which is categorized as a sex offense. RCW 9.94A.030(46)(a)(i); RCW 9A.44.086. RCW 9.94A.701(1)(a)<sup>2</sup> authorizes a trial court to impose a 36-

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<sup>2</sup> RCW 9.94A.701(1) provides in relevant part:

If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years: (a) A sex offense not sentenced under RCW 9.94A.507; or (b) A serious violent offense.

Second degree child molestation is not a specific enumerated crime sentenced under RCW 9.94A.507.

month community custody term for such offenders. As a condition of community custody, the court prohibited Trujillo from accessing the Internet, computers in general and social networking sites. The court also required him to undergo a substance abuse evaluation and follow treatment recommendations. Neither of these conditions was authorized, however.

Under RCW 9.94A.703(2), the following conditions, unless waived by the court, are mandatory:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as directed by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

RCW 9.94A.703(3) permits a sentencing court to impose any or all of the following discretionary conditions:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

In addition, the department may establish and modify additional conditions based upon the offender's risk to community safety, but may not contravene court-imposed conditions. RCW 9.94A.704(2)(a) and (6).<sup>3</sup>

Prohibiting Internet and computer access is not included in RCW 9.94A.703(2). The trial court therefore had no authority to impose the condition unless Internet and computer use reasonably related to the circumstances of the offense. Because the Internet and computers did not contribute to Trujillo's offense, the trial court lacked authority to prohibit his access.

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<sup>3</sup> RCW 9.94A.704(2)(a) provides, "[t]he department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety. RCW 9.94A.704(6) provides, "the department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions."

To prohibit access to published information, the condition must be crime-related. State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008). A crime-related prohibition is an order prohibiting conduct that directly relates to the circumstances of the crime. State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008) (prohibition on possession of cell phones and electronic storage devices was unlawful where no evidence and no findings showed Zimmer used such items in committing her crime), rev. denied, 165 Wn.2d 1035 (2009); State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). See also, State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (restriction on Riley’s computer use and communication with other hackers was crime-related where he was convicted of computer trespass).

O’Cain was convicted of second degree rape. As a condition of community custody, the trial court prohibited O’Cain from accessing the Internet without prior approval from his supervising Community Corrections Officer and sex offender treatment provider. O’Cain, 144 Wn. App. at 774.

Rejecting the State’s argument the condition was necessary to prevent access to sexual material that would increase O’Cain’s risk of reoffending, the court held access prohibitions cannot be upheld where no

evidence shows Internet use contributed to the crime. Division One of this

Court held:

There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

O'Cain, 144 Wn. App. at 775.

The same is true here. The state's allegations were that the inappropriate contact occurred when Trujillo's stepdaughter had friends over for "sleepovers." CP 5-6. Like O'Cain, Trujillo did not use the Internet to lure the girls into a sexual encounter, and no evidence or finding shows Trujillo's offenses involved websites, domains, or other Internet publications. Because the prohibition is not crime-related, it should be stricken from the judgment and sentence.

Similarly, the condition that Trujillo obtain a substance abuse evaluation and follow treatment recommendations is likewise not crime-related. As indicated above, RCW 9.94A.703(3)(c) allows the court to impose "crime-related treatment or counseling services" as a condition of community custody. RCW 9.94A.703(3)(d) allows the court to order an offender to "[p]articipate in rehabilitative programs or otherwise perform

affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]"

But a court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003) (addressing former RCW 9.94A.700 and former RCW 9.94A.715, which contained the same operative language as RCW 9.94A.703(3)(c) and (d)).

The record contains no allegation Trujillo was under the influence of drugs or alcohol at the time of the offenses or that substance abuse somehow contributed to his offenses. Accordingly, the condition is not crime-related and should be stricken from the judgment and sentence. Jones, 118 Wn. App. at 207-08.

3. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO AMEND A SCRIVENER'S ERROR.

As indicated above, RCW 9.94A.701(1) requires the court to impose three years of community custody for any (a) sex offense not sentenced under RCW 9.94A.507, or (b) a serious violent offense. The pre-printed judgment and sentence indicates the court imposed three years of community custody because Trujillo was convicted of a serious violent offense. CP 42. This is incorrect, however. Second degree child molestation is not a serious violent offense, as defined by the Legislature.

RCW 9.94A.030(45). Rather, the court imposed three years of community custody because the offense is a sex offense.

This Court should therefore remand to correct the judgment and sentence. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also State v. Bahl, 164 Wn.2d at 744 (illegal or erroneous sentences may be challenged for the first time on appeal).

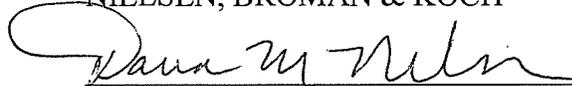
D. CONCLUSION

The court's finding that Trujillo has the present and/or future ability to pay LFOs should be stricken, as it was not actually considered by the sentencing court. Because the computer-related conditions and those relating to a substance abuse evaluation and treatment are not crime-related, they too should be stricken. Finally, the judgment should be corrected to reflect Trujillo was not convicted of a serious violent offense.

Dated this 25<sup>th</sup> day of July, 2012

Respectfully submitted

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Attorneys for Appellant

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DIVISION TWO**

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v.	)	COA NO. 43073-8-II
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	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF JULY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GEOVANI TRUJILLO  
DOC NO. 352816  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JULY 2012.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

July 25, 2012 - 2:22 PM

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