

No. 45502-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Parker,

Appellant.

Jefferson County Superior Court Cause No. 07-1-00211-7

The Honorable Judge Pro Tem James Bendell

Appellant's Reply Brief

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ARGUMENT

I. MR. PARKER DID NOT RECEIVE NOTICE SPECIFYING WHICH SENTENCING CONDITION HE WAS ACCUSED OF VIOLATING

Due process requires the state to provide adequate notice of alleged sentencing violations. *In re Blackburn*, 168 Wn.2d 881, 884-885, 232 P.3d 1091 (2010). The notice must “inform the offender of the specific violations alleged” and permit the accused to prepare a meaningful defense. *Id.* at 885.

Here, Mr. Parker was sanctioned for violating a condition of his sentence that was not mentioned in any of the violation notices he received.¹ CP 12-15, 22-25, 32-33, 36-39, 44-47, 82-84, 128-30. Still, the state argues that Mr. Parker received adequate notice because the written notices specified that his alleged violations were related to his marijuana use. Brief of Respondent, pp. 8-9. This is incorrect

Mr. Parker did not receive notice that he’d violated the provision regarding federal law. Because of the language in his violation notices, Mr. Parker prepared a defense to the allegation that he had violated the condition of his sentence related to drug use. RP 8, 11-12. But the court did not find that he had violated that condition. Instead, the court found

¹ The court’s order does not specify which condition Mr. Parker violated. CP 131. The memorandum opinion, however, specified that Mr. Parker had violated the condition requiring compliance with all federal laws. CP 128-30.

that Mr. Parker had violated the condition requiring him to comply with all federal laws, based on a novel legal theory brought out at the violation hearing. CP 128-30; RP 12.

This lack of notice put Mr. Parker in exactly the type of situation proscribed by *Blackburn*. *Blackburn*, 168 Wn.2d at 885. The lack of notice “subjected [him] to guessing games” and “asked [him] to hit a moving target. *Id.* The state’s failure to provide Mr. Parker with adequate notice prohibited him from preparing a meaningful defense. This violated his right to due process. *Id.*

The *Blackburn* court construed the due process requirements for probation revocation hearings as set out by the U.S. Supreme Court. *Id.* at 883 (*discussing Morrissey v. Brewer*, 408 U.S. 471, 488–89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). The *Morrissey* court held that due process requires an offender to be provided with “written notice of the claimed violations of parole.” *Morrissey*, 408 U.S. at 488-89. The *Blackburn* court reiterated the holding that such written notice requires the state to inform the offender of “the specific violations alleged.” *Blackburn*, 168 Wn.2d at 885. This includes information about the legal theory upon which the state will rely to argue that a person has violated his/her sentence. *Id.* at 886.

The *Blackburn* court also noted that the *Morrissey* requirements apply with “equal force” to alleged violations of SSOSA sentences. *Id.* at 884. Nonetheless, the state argues that *Blackburn* does not apply to Mr. Parker’s case because he did not face total revocation of his suspended sentence. Brief of Respondent, p. 8. Instead, the state argues that only *Morrissey*’s less definite requirement of “written notice of the claimed violations” applies. Brief of Respondent, p. 8. But the holding of *Blackburn* interprets and clarifies the *Morrissey* rule. *Id.* at 884-85. The *Blackburn* court did not limit its holding in the manner the state suggests. And respondent does not explain why the meaning of *Morrissey* would change from one situation to another. Brief of Respondent, pp. 8-9.

The *Blackburn* court held that a violation must specify any condition the offender is alleged to have violated, as well as the facts upon which the state will rely. *Blackburn*, 168 Wn.2d 881. The insufficient notice in that case read: “FAILURE TO OBEY ALL LAWS: SPECIFICALLY, THREATENING TO KILL SHELLY BLACKBURN [his sister-in-law] ON OR ABOUT 5/14/08.” *Id.* at 883. This was not specific enough to comport with due process. *Id.* at 887. Even so, the state argues that the notices alleging that Mr. Parker had used marijuana were sufficient despite the fact that they did not list any condition of his

sentence. Brief of Respondent, pp. 8-9. Respondent's argument is foreclosed by *Blackburn*.

The court infringed Mr. Parker's right to due process by committing him to jail when he had not received adequate notice of the sentencing condition he had allegedly violated. *Blackburn*, 168 Wn.2d at 884-85. Mr. Parker's order of violation must be vacated. *Id.* at 888.

II. THE SENTENCING COURT LACKED AUTHORITY TO IMPOSE DRUG-RELATED CONDITIONS UNRELATED TO MR. PARKER'S OFFENSE.

A court may not impose drug-related conditions of supervision if there is no evidence that the crime of conviction involved drugs. *State v. Warnock*, 174 Wn. App. 608, 614, 299 P.3d 1173 (2013). Such conditions would not qualify as "crime-related." RCW 9.94A.703(3)(f); RCW 9.94A.670(6)(a). Here, the court imposed drug-related prohibitions as conditions of Mr. Parker's sentence despite the fact that there was no evidence that his offense involved drugs. CP 6, 121. 138-55.

The court ordered Mr. Parker to comply with all sentencing conditions created by DOC. CP 6. DOC, in turn, ordered Mr. Parker to undergo a substance abuse evaluation and prohibited him from purchasing, possessing, or consuming drugs or drug paraphernalia; entering into areas where drugs are sold or used; and associating with people who use or sell drugs. CP 121. Nonetheless, the state argues that the crime-related

limitation does not apply to Mr. Parker's case because the conditions were ordered by DOC, not by the court. Brief of Respondent, pp. 10-12. But the court explicitly adopted any condition imposed by DOC in Mr. Parker's Judgment and Sentence. CP 6. By doing so, the court ordered the drug-related prohibitions. The state's argument fails.

The court exceeded its authority by imposing conditions of Mr. Parker's sentence that were not crime-related. *Warnock*, 174 Wn. App. at 614. The conditions pertaining to drugs must be stricken, and cannot form the basis for a violation. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

III. MR. PARKER'S SENTENCING CONDITIONS DID NOT PROVIDE FAIR WARNING OF PROSCRIBED CONDUCT AND PERMITTED ARBITRARY ENFORCEMENT.

A. Mr. Parker's sentencing condition prohibiting him from possessing or using "drugs" fails both alternatives of the vagueness test.

A sentencing condition is unconstitutionally vague if it (1) fails to define the proscribed conduct with "sufficient definiteness" that an ordinary person can understand what is prohibited or (2) fails to provide "ascertainable standards" to protect against arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 752-753, 193 P.3d 678 (2008). Here, the court's condition prohibiting Mr. Parker from purchasing, possessing, or

consuming “drugs” without a valid prescription from a licensed medical professional fails both prongs of this test. CP 121.

The condition in this case is directly analogous to that prohibiting possession of “paraphernalia” in *Valencia*. *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). Under the first alternative of the vagueness test, the *Valencia* court found that the broad possible definition of “paraphernalia” failed to define the proscribed conduct with sufficient definiteness. *Valencia*, 169 Wn.2d at 793. The court refused to read limiting language into the condition when none was included in its text. *Id.* Nonetheless, the state argues that the court should read limiting language into the sentencing condition here because “it is obvious that drugs not requiring a prescription...are not included in this condition.” Brief of Respondent, p. 15. The state’s argument for a construction of Mr. Parker’s condition beyond its plain language is precluded by *Valencia*.

The court also found that the *Valencia* condition violated the second alternative of the vagueness test because “an inventive probation officer” could read it to include commonplace household items. *Valencia*, 169 Wn.2d at 794-95. The same is true here. An overzealous officer could interpret the condition in Mr. Parker’s case to include over-the-counter medications, herbal remedies, or any “unsalable commodity.” The

condition fails to provide ascertainable standards to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

Respondent fails to address the second alternative to the vagueness test. Brief of Respondent, pp. 12-15. The state's failure to argue the issue can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The sentencing condition prohibiting "drugs" is also unconstitutionally vague as applied to the facts of Mr. Parker's case. Even if the prohibition against "drugs" is read to include only illegal substances, it is not clear whether that encompasses marijuana after its legalization in Washington. *See* Laws of 2013, c. 3, § 22. Again, this court can consider the state's failure to address this issue as a concession. *Pullman*, 167 Wn.2d at 212 n. 4.

The sentencing condition prohibiting Mr. Parker from buying or using "drugs" is unconstitutionally vague on its face and as applied to this case. *Bahl*, 164 Wn.2d at 752-53. The condition must be stricken and Mr. Parker's sanction for its violation must be reversed. *Id.*

B. The sentencing requirement that Mr. Parker obey all federal laws is unconstitutionally vague as applied to this case.

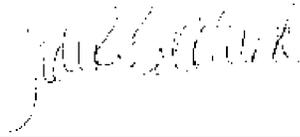
Respondent fails to meaningfully address this issue. Accordingly, Mr. Parker relies on the argument in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Parker's Opening Brief, the invalid conditions of his sentence must be stricken and Mr. Parker's sanction for their violation must be reversed.

Respectfully submitted on August 7, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

James Parker
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Brinnon, WA 98320

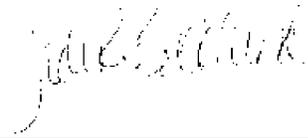
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on August 7, 2014.



Jodi R. Backlund, WSBA No. 22917
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