

FILED
Court of Appeals
Division II
State of Washington
12/10/2018 4:42 PM

No. 51201-7-II

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

State of Washington,

Respondent,

v.

Anthony Glen Houck,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. This Court should strike two conditions of community custody because one is unconstitutional, and the court possessed no authority to impose the other..... 1

 a. The court imposed an unlawful condition of community custody that subjects Mr. Houck to criminal sanctions if he possesses or consumes medical marijuana. 1

 b. The condition that prohibits Mr. Houck from associating with “known drug users/sellers except in treatment settings” is unconstitutionally vague. 4

2. This Court should strike the clerk’s fee, the non-restitution interest, and the DNA fee. 6

B. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Cases

| | |
|---------------------------------------------------------------------------------------------------------------------------------|---|
| <i>In re F.D. Processing Inc.</i> , 119 Wn.2d 452, 832 P.2d 1303 (1992) | 3 |
| <i>Matter of Arnold</i> , __ Wn.2d __, 410 P.3d 1133 (2018)..... | 5 |
| <i>State v. Catling</i> , 2 Wn. App. 819, 413 P.3d 27 (2018), <i>review granted on other grounds</i> 191 Wn.2d 1001 (2018)..... | 7 |
| <i>State v. Irwin</i> , 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015)..... | 4 |
| <i>State v. Llamas-Villa</i> , 67 Wn. App. 448, 836 P.2d 239 (1992) | 4 |
| <i>State v. Loutzenhiser</i> No. 331369, 2016 WL 1182307 (Wash. Ct. App. Mar. 24, 2016)..... | 2 |
| <i>State v. Myers</i> , No. 327591, 2016 WL 181524 (Wash. Ct. App. Jan. 12, 2016) | 3 |
| <i>State v. Ramirez</i> , no. 952493, 2018 WL 4499761 (Wash. Sept. 20, 2018) 6 | |
| <i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005) | 3 |
| <i>State v. Sanchez Valencia</i> , 169 Wn.2d 782, 364 P.3d 830 (2015)..... | 5 |

Legislative Authorities

| | |
|---------------------------------|---|
| Laws of 2007, ch. 307 § 1 | 1 |
|---------------------------------|---|

Statutes

| | |
|------------------------------|------|
| RCW 69.51A.030(1)..... | 3 |
| RCW 69.51A.005(4)..... | 1, 3 |
| RCW 69.51A.055(1)(a) | 1, 3 |
| RCW 9.94A.120(8)(c)(ii)..... | 5 |
| RCW 9.94A.777(2)..... | 7 |

Court Rules

| | |
|---------------|---|
| GR 14.1 | 3 |
|---------------|---|

Other Sources

| | |
|---------------------------------------------------------------------------------------------------------------------------|---|
| <i>Medical Marijuana: History in Washington</i> , Wash. St. Dep't of Health ... | 1 |
| Supplemental Brief of Respondent, <i>State v. Hyer</i> , No. 499851, 2018 WL 6002927 (Wash. Ct. App. Nov. 15, 2018) | 7 |

A. ARGUMENT IN REPLY

1. This Court should strike two conditions of community custody because one is unconstitutional, and the court possessed no authority to impose the other.

- a. The court imposed an unlawful condition of community custody that subjects Mr. Houck to criminal sanctions if he possesses or consumes medical marijuana.

The people of this state voted in favor of legalizing the use of medical marijuana for individuals suffering from a range of debilitating conditions.¹ In turn, our Legislature enacted legislation to ensure that individuals suffering from debilitating conditions would not be subjected to criminal sanctions for their use of medical marijuana, subject to some limitations. Laws of 2007, ch. 307 § 1, 2; RCW 69.51A.005(4); RCW 69.51A.040.

Our legislature divested courts from imposing criminal sanctions upon individuals and instead provided that only correctional agencies and jails could, pursuant to a specific procedure, subject individuals to criminal sanctions for their use of medical marijuana. RCW 69.51A.055(1)(a); RCW 69.51A.005(4); *see* Op. Br. at 10-19. Numerous

¹ *Medical Marijuana: History in Washington*, Wash. St. Dep't of Health, <https://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuana/LawsandRules/HistoryinWashington> (last visited May 30, 2018).

canons of construction confirm this interpretation of the Washington Medical Use of Cannabis Act (MUCA): (1) *expressio unius est exclusio alterius*; (2) *noscitur a sociis*; (3) *edjusedem generis*; and (4) the rule of lenity. *See* Op. Br. at 10-20.

The State does not counter by explicitly claiming these interpretive tools fail to support the conclusion that courts possess no discretion to subject individuals to criminal sanctions for their use of medical marijuana; instead, the State appears to argue (1) courts have already rejected this argument; and (2) this Court should assume the legislature did not explicitly mention the term “court” in the applicable statutes that allow certain entities to impose criminal sanctions on medical marijuana users because the legislature concluded it would be unnecessary to include this term. Resp. Br. at 12-18. These arguments are unpersuasive, and this Court should reject them.

As far as counsel is aware, neither this Court nor the Washington Supreme Court has ever assessed whether MUCA forbids courts from imposing conditions of community custody that subject individuals to criminal sanctions for their use of medical marijuana. While other appellants have challenged the condition Mr. Houck challenges based on other theories, they have not challenged this condition based on Mr. Houck’s specific theory. *See, e.g., State v. Loutzenhiser* No. 331369, 2016

WL 1182307 (Wash. Ct. App. Mar. 24, 2016); *State v. Myers*, No. 327591, 2016 WL 181524 (Wash. Ct. App. Jan. 12, 2016).² Therefore, the State’s claim that other courts have “rejected the same argument the defendant presents here” is simply untrue. Resp. Br. at 12.

This Court should ignore the State’s apparent invitation to ignore numerous canons of statutory construction and insert the term “court” in RCW 69.51A.005(4). Resp. Br. at 11-18; *see State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) (rejecting an interpretation of a statute that would violate numerous fundamental principles of statutory construction). As the Legislature did in other portions of the MUCA statute, the Legislature could have inserted the term “court” in RCW 69.51A.005(4), but it specifically chose not to. *See, e.g.*, 69.51A.030(1), (2).

This Court should presume the Legislature deliberately omitted this term and only granted certain entities with the ability to subject an individual to criminal sanctions (pursuant to a procedure) because this is precisely what the statute says. RCW 69.51A.005(4); *see also* RCW 69.51A.055(1)(a); *In re F.D. Processing Inc.*, 119 Wn.2d 452, 457-58,

² Mr. Houck cites to these cases pursuant to GR 14.1.

832 P.2d 1303 (1992) (interpreting a statute with the presumption that the Legislature deliberately chooses the language it employs in a statute).

- b. The condition that prohibits Mr. Houck from associating with “known drug users/sellers except in treatment settings” is unconstitutionally vague.

This court should strike the condition that prohibits Mr. Houck from associating with “known drugs users/sellers except in treatment settings” because the condition is unconstitutionally vague.³ See Op. Br. at 6-8; CP 154. The condition is vague because it is unclear whether the condition prohibits Mr. Houck from associating with drug users/sellers “known” to him, the community, or his community corrections officer (CCO). The condition is also vague because it is subject to arbitrary enforcement, as Mr. Houck’s CCO could punish Mr. Houck for associating with drug users/sellers unknown to him but “known” to his CCO.

In response, the State relies on a Division One case, *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992), to argue this condition conforms with the constitution. Resp. Br. at 19-20, 22-23. In *Llamas-Villa*, the appellant challenged a condition of community custody

³ A condition of community custody is unconstitutionally vague if it fails to “(1) provide ordinary people fair warning of proscribed conduct; and (2) have standards that are definite enough to protect against arbitrary enforcement.” *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015)

that prohibited him from associating with persons using, possessing, or dealing with controlled substances because it was unconstitutionally vague. 67 Wn. App. at 454. The sentencing court had the authority to restrict the appellant's association with certain groups of people pursuant to former RCW 9.94A.120(8)(c)(ii), which allowed the court to preclude the appellant from having "direct or indirect contact with the victim of the crime or a specified class of individuals." *Llamas-Villa*, 67 Wn. App. at 455.

Although the court acknowledged the correct legal framework to assess a vagueness challenge, the court cursorily concluded that because the Sentencing Reform Act (SRA) did not forbid courts from prohibiting individuals from interacting with people *known to the defendant* to engage in certain conduct, the challenged condition was unconstitutionally vague. *Id.* at 455-56. This assessment conflates statutory authority with constitutional authority. Moreover, the court's conclusion appears to simply assume that because the statute did not contain a "knowing" requirement, the condition was constitutional; however, our Supreme Court later made clear that this Court *does not* presume that conditions of community custody are constitutional. *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 364 P.3d 830 (2015).

Because the reasoning in *Llamas-Villas* is flawed, this Court should decline to adopt its holding. *See Matter of Arnold*, 109 Wn.2d 136, 410 P.3d 1133 (2018) (“the divisions of the Court of Appeals have traditionally treated decisions from other divisions as persuasive rather than binding because it allows for rigorous debate and improves the quality of appellate advocacy and the quality of judicial decision making”) (internal citations and quotations omitted).

Both Mr. Houck and the State appear to agree that if the condition restricts his association with drug users/sellers specifically known to *him*, then the condition is constitutional. Resp. Br. at 25. However, the condition of community custody as currently written does not make clear whether the “known” requirement specifically applies to Mr. Houck. CP 154. This Court should remand for clarification.

2. This Court should strike the clerk’s fee, the non-restitution interest, and the DNA fee.

Due to our Supreme Court’s decision in *State v. Ramirez*, no. 952493, 2018 WL 4499761 (Wash. Sept. 20, 2018) (holding that new legislation that bars courts from imposing discretionary costs on indigent defendants applies prospectively to cases on appeal), the State concedes this Court should remand so the trial can strike the clerk’s fee. Resp. Br. at

31. This concession is well-taken, and Mr. Houck encourages this Court to accept the State's concession.

However, the State maintains this Court should not strike the DNA fee because although Mr. Houck has prior convictions which required him to pay the DNA fee and required the State to extract his DNA, this Court should assume the State did not extract his DNA per the court order. Resp. Br. at 31-32. But this Court should presume the State followed the order and collected the DNA. Moreover, the State has access to its own database and can readily determine whether it previously extracted Mr. Houck's DNA. *See* Supplemental Brief of Respondent at 2, *State v. Hyer*, No. 499851, 2018 WL 6002927 (Wash. Ct. App. Nov. 15, 2018).⁴

Alternatively, for the reasons stated in Mr. Houck's opening brief, this Court can also require the sentencing court to conduct an inquiry into Mr. Houck's ability to pay the DNA fee due to his mental illness. Op. Br. at 25-28; *see also State v. Catling*, 2 Wn. App. 819, 413 P.3d 27 (2018), *review granted on other grounds* 191 Wn.2d 1001 (2018) (stating the defendant was free to raise his unpreserved challenge to the court's failure to conduct the appropriate inquiry under RCW 9.94A.777(2) upon remand).

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https://www.courts.wa.gov/index.cfm?fa=controller.showEfiledDoc&fileName=499851_Briefs_20181023104830D2790926_4470.pdf

B. CONCLUSION

For the reasons stated in this brief and in his opening brief, Mr. Houck asks this Court to remand with instructions for the sentencing court to strike the offending conditions of community custody and also strike the clerk's fee, the DNA fee, and all non-restitution interest.

DATED this 10th day of December, 2018.

Respectfully submitted,

/s Sara S. Taboada

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Attorney for Appellant

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| STATE OF WASHINGTON, |) | |
| |) | |
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| v. |) | |
| |) | |
| ANTHONY HOUCK, |) | |
| |) | |
| Appellant. |) | |

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December 10, 2018 - 4:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Anthony G. Houck, Appellant
Superior Court Case Number: 14-1-01366-5

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