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Court of Appeals
Division II
State of Washington
8/9/2019 8:00 AM

No. 52256-0-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Jeffrey William Hoch,

Appellant.

AMENDED BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ANSWERS TO ASSIGNMENT OF ERROR 2
II. STATEMENT OF THE CASE 2
III. ARGUMENT 2

TABLE OF AUTHORITIES

Cases

State v. Ancira, 107 Wn.App. 650, 27 P.3d 1246 (2001) 4, 5
State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 5
State v. Corbett, 158 Wn.App. 576, 242 P.3d 52 (2010) 4, 5
State v. Harkness, 145 Wn.App. 678, 186 P.3d 1182 (2008) 2, 3
State v. Petterson, 198 Wn.App. 673, 394 P.3d 385 (2017), ... 2, 3
State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989) 2, 3
Wandell v. State, 175 Wn.App. 447, 311 p.3d 28 (2013) 3, 4

Statutes

RCW 10.73.090 2
RCW 10.73.100 2
RCW 9.94A.585(7) 3

Rules

CrR 7.8 4

I. ANSWERS TO ASSIGNMENT OF ERROR

1. The trial court should have denied Appellant's motion because it was time-barred, and the trial court lacked authority to modify the sentencing condition.
2. The trial court properly denied Appellant's motion to modify a condition of community custody, as the decision was not manifestly unreasonable.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts and will make note of specific factual issues as they arise during the course of argument.

III. ARGUMENT

A. Procedurally, this court should affirm the trial court's denial because the motion to modify itself was not proper.

As directed by this court, the State examined the issue of the timeliness of the motion and now contends that as a threshold issue, the motion to modify the condition of community custody was time-barred under RCW 10.73.090. It has been more than one year since the judgment and sentence became final, so any collateral attack is time barred under RCW 10.73.090. None of the enumerated exceptions from RCW 10.73.100 apply in this circumstance.

Even if the court were to consider the issue regardless of the time-bar, the motion to modify a condition of community custody was not properly before the court, because the court lacked authority to

modify said condition. The trial court imposed the condition of no contact with any minors under the age of 18 years old when the Appellant was sentenced on September 27th, 2005. "After final judgment and sentencing, the court loses jurisdiction to the [Department of Corrections]." *State v. Harkness,* 145 Wn.App. 678, 685, 186 P.3d 1182 (2008). Once Appellant was sentenced, he was transferred to the care and control of the Department of Corrections, who then had the sole authority to maintain, modify, and supervise any conditions of community custody. The "SRA permits modification of sentences only in specific, carefully delineated circumstances." *State v. Shove,* 113 Wn.2d 83, 86, 776 P.2d 132 (1989). SRA sentences can only be modified if "they meet the requirements of the SRA provisions relating directly to the modification of sentences." *Id.* at 88, 776 P.2d 132. "Absent explicit authorization, the superior court lacks jurisdiction to modify an offender's sentence." *State v. Petterson,* 198 Wn.App. 673, 682, 394 P.3d 385 (2017), *citing State v. Shove,* 113 Wn.2d at 88-89; *State v. Harkness,* 145 Wn.App. at 685-86. There is no specific statutory provision that allows the modification of a community custody condition by the trial court.

Division One dealt with a similar issue and ultimately found that the trial court lacked authority to modify conditions of community custody. *Wandell v. State,* 175 Wn.App. 447, 311 p.3d 28 (2013). In that case, Brian Wandell brought a timely motion to

modify his judgment and sentence to change a provision regarding his ability to remain "overnight in a residence where minor children live or are spending the night." *Id.* at 451, 311 p.3d 28. The trial court granted the motion and the Washington State Department of Corrections filed a post-sentence petition seeking review of the order under RCW 9.94A.585(7). *Id.* Division One ultimately found that the trial court had no authority to modify the sentence. Division Two ruled similarly in *State v. Petterson*, 198 Wn.App. at 683, 394 P.3d 385. The trial court did not have the authority to modify the condition of community custody, because there was neither statutory authority nor jurisdiction, since the Appellant is within the custody of the Department of Corrections.

The motion to modify the sentence was also improper because it was not a personal restraint petition. The *Wandell* court clarified that any attempt to modify the provisions of community custody should be brought about as a collateral attack on the judgement and sentence, either through a personal restraint petition or a writ of *Habeas Corpus*. *Id.* at 453, 311 P.3d 28. The court held that a modification similar to the one requested by Appellant should not be considered as a CrR 7.8(b)(5) motion, which is essentially what Appellant filed at the trial court level.

This court should affirm the trial court's denial of the motion to modify because it was time-barred, the trial court lacked authority to

modify the condition, and because it was improperly filed as a CrR 7.8 motion, instead of a personal restraint petition.

B. The trial court properly denied the Appellant's motion to modify a condition of community custody

As directed by this court, the Respondent now examines the requirements and standards for the imposition of the crime-related prohibition in this case. This court should affirm the trial court's denial of the motion to modify.

The trial court did not abuse its discretion when it denied Appellant's motion to modify. A trial court's decision regarding a crime-related prohibition is reviewed for an abuse of discretion. *State v. Corbett,* 158 Wn.App. 576, 597, 242 P.3d 52 (2010). A trial court abuses its discretion when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id., citing State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001). Sentencing courts may restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children. *Id.* at 598, 242 P.3d 52, *citing State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), *Ancira*, 107 Wn.App. at 654, 27 P.3d 1246. The trial court here found that the original sentencing condition was reasonable and appropriate and that determination should not be disturbed on appeal.

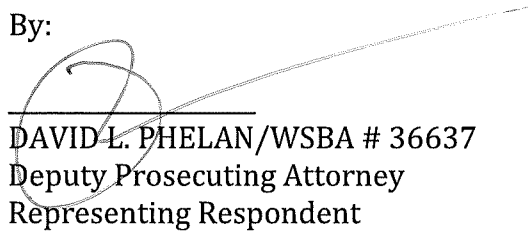
The trial court's decision to deny Appellant's motion to modify falls squarely within the 4 corners of *Corbett*. The court appropriately noted the similarities, including the issue regarding a female victim and male biological children. *Corbett*, 158 Wn.App. at 600, 242 P.3d 52. The trial court's decision was not manifestly unreasonable, nor exercised on untenable grounds or for untenable reasons. This court should affirm the trial court's denial.

Review of this issue is further confused because of the significant delay in addressing the sentencing condition, because the record of the original sentencing court's determination is not available for review.

Respectfully submitted this 8th day of August, 2019.

RYAN P. JURVAKAINEN
Prosecuting Attorney

By:



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CERTIFICATE OF SERVICE

DAVID PHELAN, certifies that opposing counsel was served electronically via the Division II portal:

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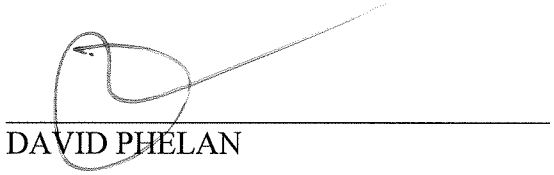
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 8th, 2019.



DAVID PHELAN

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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