

FILED
Court of Appeals
Division II
State of Washington
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No. 52646-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID GARDNER,

Appellant

Brief of Appellant

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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. The court exceeded its statutory authority when it imposed a term of community custody as a part of the sentence for David Gardner's conviction for taking a motor vehicle.

2. The court exceeded its authority when it required Mr. Gardner to engage in treatment as a condition of his sentence for taking a motor vehicle.

3. The trial court erred in imposing a vague condition of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court may only impose a sentence authorized by statute. Statutes pertaining to community custody do not permit imposition of any term of community custody for Mr. Gardner's conviction of taking a motor vehicle. Thus, the court lacked authority to impose a term of community custody and the term must be stricken.

2. The statute permitting a court to require chemical dependency treatment as a condition of sentence do not

permit the imposition of that condition for Mr. Gardner's taking a motor vehicle conviction. Thus, the court lacked authority to impose that condition and the condition must be stricken.

3. A condition of community custody is impermissibly vague if it fails to provide adequate notice of the prohibited conduct or invites arbitrary enforcement. The requirement that Mr. Gardner refrain from associating with drug users fails to provide notice of the prohibited conduct and invites arbitrary enforcement. Thus, the condition is impermissibly vague and must be stricken.

C. STATEMENT OF FACTS

The State charged Mr. Gardner with possession of heroin. CP 33. In a separate case, the State charged him with taking a motor vehicle. CP 4. Mr. Gardner pleaded guilty to both charges. CP 4-14, 35-44.

On the possession count, the court imposed a sentence of 33 days confinement under a First Time Offender Waiver. CP 55-56. On the other count the court imposed 20 days

confinement. CP 23. The court ordered 12 months of community custody for each count. CP 24, 55. As a condition of community custody for each, the court directed that Mr. Gardner refrain from associating with drug users or drug sellers. CP 28, 61. Additionally as a condition of each sentence, the court required Mr. Gardner to participate in chemical dependency treatment. CP 26, 57.

D. ARGUMENT

- 1. The court must strike the term of community imposed as a part of the sentence for Mr. Gardner's conviction of taking a motor vehicle.*

A court's sentencing authority is limited to that provided by the legislature. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court's failure to follow the dictates of the Sentencing Reform Act requires reversal of the sentence even if the defendant did not object below. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). A court lacks authority to impose community custody for any offense except as provided

by statute. *In re Post Sentence Review of Childers*, 135 Wn. App. 37, 40, 143 P.3d 831, 832 (2006).

The standard range for Mr. Gardner's conviction of taking a motor vehicle was 0 to 90 days. CP 20. The court imposed a sentence of 20 days. CP 23. For sentences with less than one year of confinement, RCW 9.94A.702 controls the imposition of community custody. That statute lists categories of offenses with a sentence of less than one year for which "the court may impose up to one year of community custody."

Taking a motor vehicle without permission does not fall within any of the listed categories of offenses. Thus, the court lacked legal authority to impose any term of community custody on Mr. Gardner for his conviction of taking a motor vehicle. *Childers*, 135 Wn. App. at 40.¹

¹ For the possession count, RCW 9.94A.702 did authorize the court to impose up to one year of community custody. This is permissible both because it is a sentence of less than one year for a drug offense and because the court used the First Time Offender Waiver on that charge.

2. The court lacked authority to impose treatment as a condition of Mr. Gardner's sentence for taking a motor vehicle.

If a court finds a person has a chemical dependency that contributed to the offense, RCW 9.94A.607 permits the court to require the person to participate in rehabilitative programs including treatment. However, that authority is limited to sentences which include a term of something other than total confinement. RCW 9.94A.607(2). Because the court could not legally impose a term of community custody for taking a motor vehicle, and the only remaining term was for total confinement, the court could not order chemical dependency treatment as a condition of sentence.

Again, because the court lawfully imposed a term of community custody for Mr. Gardner's possession conviction, the court could impose treatment as a condition of that sentence.

3. A condition that Mr. Gardner not associate with drug users is unconstitutionally vague.

A sentencing court cannot impose unconstitutionally vague conditions of community custody. *State v. Bahl*, 164

Wn.2d 739, 753, 193 P.3d 678 (2008). This Court does not presume that community custody conditions are constitutional. *Id.*

Here, the trial court imposed a condition that requires Mr. Gardner “refrain from associating with drug users or sellers.” CP 28, 61. The Due Process Clause of the Fourteenth Amendment forbids vague laws. *Bahl*, 164 Wn.2d at 752-53. Laws must “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). The same analysis applies when courts determine whether a community custody condition is unconstitutionally vague. *Id.* at 652-53.

For example, in *Irwin*, the defendant was charged with second degree child molestation and second degree possession of depictions of minors engaged in sexually explicit conduct. 191 Wn. App. at 647. The court imposed a community custody condition commanding the defendant not to “frequent areas

where minor children are *known* to congregate as defined by the supervising CCO.” *Id.* at 652 (emphasis added). The defendant challenged this condition, arguing it was unconstitutionally vague. *Id.* The defendant argued it was unclear if the condition included “public parks, bowling alleys, shopping malls, theaters, churches, hiking trails, and other public places where there may be children.” *Id.* at 654.

This Court struck this condition as vague under both prongs of the vagueness analysis. *Id.* at 654-55. The condition failed the first prong because it did not give ordinary people sufficient notice to understand what conduct was prohibited, as it was unclear what exactly constituted an area where children are “known” to congregate. *Id.* at 655. This court also found that allowing the CCO to determine locations “where children are known to congregate” would leave the condition vulnerable to arbitrary enforcement, which would “render the condition unconstitutional under the second prong of the vagueness analysis.” *Id.* at 655.

Unlike in *Irwin*, the condition here is not even limited to “known” drug users or sellers. Mr. Gardner could violate the condition without any prior knowledge that a person is drug user or seller. That is wholly arbitrary. This condition fails to give Mr. Gardner any sort of warning as to who exactly he is prohibited from associating with.

Moreover, the court ordered Mr. Gardner to engage in a drug evaluation and treatment. It is impossible for him to that without violating the condition that he refrain from associating with drug users.

The condition is unconstitutionally vague and should be stricken.

E. CONCLUSION

Because the sentence on Count Two is legally erroneous, this Court must strike the term of community custody. The remainder of the sentence, however, is not legally erroneous and no other modification of the sentence is permissible.

DATED this 19th day of April, 2019.

A handwritten signature in black ink that reads "Gregory C. Link". The signature is written in a cursive style with a large, stylized initial 'G'.

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

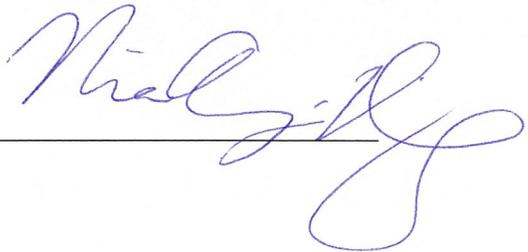
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52646-8-II
v.)	
)	
DAVID GARDNER,)	
)	
Appellant.)	

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