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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID M. GARDNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitener

No. 18-1-01471-1 & 18-1-02893-2

Brief of Respondent

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A. INTRODUCTION

Defendant David Gardner pleaded guilty to unlawful possession of a controlled substance, heroin, and taking a motor vehicle without permission in the second degree. At sentencing, Defendant described himself as an addict. He said his addiction held him back in life and he was ready to move on.

On the drug possession case, the court ordered Defendant to “refrain from associating with drug users and drug sellers” while on community custody. This condition was reasonably imposed to prevent Defendant’s relapse and protect society from the commission of future crimes. Defendant now challenges the condition as vague.

Defendant cannot show beyond a reasonable doubt this condition is unconstitutionally vague. First, a person of ordinary intelligence understands the condition to forbid more than incidental contact with individuals actively using or selling drugs. Second, the condition provides clear standards for enforcement and there is an opportunity to present a defense to an alleged violation. The State asks this Court to affirm this condition.

The State agrees Defendant’s taking a motor vehicle conviction should not include community custody and this term has already been removed by the trial court. The State further agrees substance abuse

treatment should not have been imposed on Defendant's taking a motor vehicle case and asks the Court to remand the case for the trial court to strike this condition.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should Defendant's taking a motor vehicle case be remanded to strike the term of community custody when the trial court previously entered an order removing this condition?
2. Should Defendant's taking a motor vehicle case be remanded to strike the condition of substance abuse treatment when imposition of this condition exceeded the trial court's authority?
3. Should this Court affirm the challenged community custody condition prohibiting Defendant's association with drug users and sellers when the condition is not unconstitutionally vague because it can be understood by an ordinary person and contains adequate standards to protect against arbitrary enforcement?

C. STATEMENT OF THE CASE.

Defendant David Gardner was charged with two felony offenses in Pierce County Superior Court in 2018. CP 3, 4, 33. He was charged under Pierce County Superior Court cause number 18-1-02893-2 with unlawful possession of a stolen vehicle for an incident taking place on January 31, 2018. CP 3. He was also charged under Pierce County Superior Court cause number 18-1-01471-1 with unlawful possession of a controlled substance, heroin, for an incident taking place on April 12, 2018. CP 33.

Both cases resolved on October 16, 2018. CP 5-14, 35-44. Defendant pleaded guilty as charged to unlawful possession of controlled substance, heroin. CP 35-44. He also pleaded guilty to the amended charge of taking a motor vehicle without permission in the second degree. CP 4, 5-14. He was sentenced on both cases the same day. CP 17-29, 48-62.

At sentencing, Defendant told the court he was “ready to get on with my life” and that “[b]eing an addict has held me back for some time now.” 10/16/18 RP 14. Defendant had already arranged for drug treatment to address these issues. 10/16/18 RP 14-15.

On the possession case, Defendant was sentenced as a first time offender to 33 days in custody and 12 months of community custody. CP 54, 55. Defendant was required in this case to engage in substance abuse

treatment and “refrain from associating with drug users or drug sellers.”
CP 57, 61.

On the taking a motor vehicle case, Defendant was sentenced to 20 days in custody and 12 months community custody. CP 23-24. This sentence was concurrent to his possession case. CP 23. The court also imposed the condition of substance abuse treatment. CP 26. On March 6, 2019, the court entered an order removing the term of 12 months community custody. CP 73-75. The condition of substance abuse treatment remains in the judgment and sentence. CP 26, 73-75. Defendant timely appealed. 63-65.

D. ARGUMENT.

1. DEFENDANT’S FIRST ASSIGNMENT OF ERROR IS MOOT AS THE TRIAL COURT HAS ALREADY TAKEN ACTION TO STRIKE THE TERM OF COMMUNITY CUSTODY FROM THE TAKING A MOTOR VEHICLE CASE

Defendant’s first assignment of error is moot as the trial court has already taken action to remove the term of community custody from his taking a motor vehicle case. CP 73-75. The crime of taking a motor vehicle without permission in the second degree does not include a term of community custody. RCW 9.94A.505; RCW 9.94A.701; RCW 9.94A.702. The trial court has already addressed this error and removed the term of community custody from Defendant’s taking a motor vehicle judgment

and sentence. CP 73-75. The case does not need to be remanded for this issue. The State asks the Court to disregard this issue.

2. THIS COURT SHOULD REMAND
DEFENDANT'S TAKING A MOTOR VEHICLE
CASE SO THE TRIAL COURT CAN STRIKE
THE CONDITION OF SUBSTANCE ABUSE
TREATMENT

The State agrees the trial court did not have the authority to impose substance abuse treatment on Defendant's taking a motor vehicle case because the offense does not include a term other than total confinement and the court did not find Defendant had a chemical dependency that contributed to the offense. A sentencing court may impose crime-related prohibitions and affirmative conditions on any sentence subject to the provisions in Chapter 9.94A. RCW 9.94A.505(9). Pursuant to RCW 9.94A.607, the trial court may order a chemical dependency evaluation if (1) the court has made a finding chemical dependency contributed to the offense, and (2) the sentence includes a term other than or in addition to total confinement. RCW 9.94A.607; *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1172 (2013). Absent either of these conditions, the court may not order a chemical dependency evaluation and treatment. *In re Personal Restraint of Childers*, 135 Wn. App. 37, 41, 143 P.3d 831 (2006); *In re Sentence of Jones*, 129 Wn. App. 626, 631, 120 P.3d 84 (2005).

The crime of taking a motor vehicle does not include a term of community custody. RCW 9.94A.701; RCW 9.94A.702. Additionally, the trial court did not make any finding that chemical dependency contributed to the offense. CP 17-29, 10/16/18 RP 1-17. Because neither of the required conditions under RCW 9.94A.607 have been met, the State asks this Court to remand Defendant's taking a motor vehicle case for the trial court to strike the condition requiring a chemical dependency evaluation and treatment. The condition of substance abuse treatment should remain on Defendant's unlawful possession of a controlled substance case because the sentence includes community custody and the court made a finding that chemical dependency contributed to the offense. CP 51, 55.

3. THE CONDITION REQUIRING THE DEFENDANT TO REFRAIN FROM ASSOCIATING WITH DRUG USERS OR DRUG SELLERS IS NOT UNCONSTITUTIONALLY VAGUE AS IT CONVEYS WHAT CONDUCT IS PROHIBITED AND PROTECTS AGAINST ARBITRARY ENFORCEMENT

The condition requiring Defendant to "refrain from associating with drug users or drug sellers" is not unconstitutionally vague as its plain language effectively conveys what conduct is prohibited and protects against arbitrary enforcement. Community custody conditions are imposed to address the circumstances leading to an offender's present conviction and to prevent the commission of future crimes. *State v. Nguyen*, 191

Wn.2d 671, 684-85, 425 P.3d 847 (2018). The Sentencing Reform Act authorizes the trial court's imposition of crime-related conditions to address these goals. RCW 9.94A; *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006). Conditions of community custody are imposed under RCW 9.94A.703. Under this section, the court may in its discretion order an offender to refrain from contact with a specified class of individuals. RCW 9.94A.703(3)(b). A prohibition of this kind must be connected to the circumstances of the commission of the crime. *State v. Munoz-Rivera*, 190 Wn. App. 870, 893, 361 P.3d 182 (2015). Even when such a prohibition infringes upon an offender's fundamental right of association, the condition is valid when "necessary to accomplish the essential needs of the State and public order." *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); *see also Hearn*, 131 Wn. App. at 607.

Challenges to community custody conditions based on vagueness may be made for the first time on appeal and before enforcement of the condition. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Community custody conditions imposed by the trial court are reviewed for abuse of discretion and will be reversed only if "manifestly unreasonable." *Id.* An unconstitutional condition is always "manifestly unreasonable." *Nguyen*, 191 Wn.2d at 678. The "due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution

requires that citizens have fair warning of proscribed conduct.” *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

A condition challenged for vagueness is analyzed pursuant to a two-part test. *Padilla*, 190 Wn.2d at 679. The condition is constitutional if (1) an ordinary person using common sense can understand what the condition prohibits, and (2) the condition contains adequate standards to protect against arbitrary enforcement. *Id.* at 679-80. But given the inherent vagueness of language and the complexity of human activity, “a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Id.* at 677 (quoting *State v. Valencia*, 169 Wn. App. 782, 793, 239 P.3d 1059 (2010)).

- a. A person of ordinary intelligence understands the prohibition against association with drug users and drug sellers to mean more than incidental contact with persons currently engaged in the sale or use of drugs.

A person of ordinary intelligence understands the prohibition against association with drug users and drug sellers to mean more than incidental contact with individuals currently engaged in drug use or sale. Language challenged for vagueness “is afforded a sensible, meaningful, and practical interpretation.” *City of Spokane v. Douglass*, 115 Wn.2d 693,

697, 795 P.2d 693 (1990). Terms are considered in the context in which they are used. *Bahl*, 164 Wn.2d at 754. Undefined terms are considered based on their “plain and ordinary meaning as set forth in a standard dictionary.” *Id.* at 754. Due process does not require “impossible standards of specificity,” as “language always involves some degree of vagueness.” *Id.* at 759.

Courts have previously analyzed terms commonly used in conditions prohibiting association with a class of people, including drug users and sellers. Courts have found “associate” to mean “more than incidental contacts.” *United States v. Soltero*, 510 F.3d 858, 866-67 (2007) (examining “associate” in condition prohibiting contact with gang members). Similarly, the terms “users” and “sellers” have been found to plainly refer to current and ongoing activity rather than past behavior. *In re Personal Restraint of Brettell*, 6 Wn. App. 2d 161, 170, 430 P.3d 677 (2018).

The condition Defendant “refrain from associating with drug users or drug sellers” clearly conveys to an ordinary person Defendant may not have more than incidental contact, such as personal relationships, liasons, or dealings, with those currently engaged in the use or sale of drugs. *Soltero*, 510 F.3d at 866-67 (2007); *In re Brettell*, 6 Wn. App. 2d at 170. Even if Defendant is not engaging in illegal activity with these individuals,

the condition “seek(s) to prevent reversion into a former crime-inducing lifestyle by barring contact with old haunts and associates.” *Soltero*, 510 F.3d at 866 (quoting *United States v. Bolinger*, 940 F.2d 478, 480 (1991)).

Considering the plain language and meaning of the prohibition, Defendant’s concern this condition would prevent him from participating in drug treatment, where he may have incidental contact with active drug users or sellers, is unwarranted. The State asks the Court to find this condition constitutional as an ordinary person can understand what the condition prohibits.

- b. The condition prohibiting association with drug users or drug sellers protects against arbitrary enforcement as the language is not subject to interpretation by a community corrections officer and Defendant can assert a defense of unknowing contact

The condition requiring Defendant to “refrain from associating with drug users or drug sellers” gives adequate guidance to authorities as to what conduct is prohibited and allows for an opportunity to assert a relevant defense at a violation hearing. RCW 9.94A.737; WAC 137.104.050. In the same way it clearly conveys to an ordinary person what conduct is prohibited, the language of the condition provides “ascertainable standards for enforcement” to a community corrections officer. *State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (quoting *Bahl*, 164 Wn.2d at 758). No further definition to the prohibition

on association with drug users and drug sellers is required to enforce the condition, which is plain on its face. *See Bahl*, 164 Wn.2d at 758; *see also State v. Sansone*, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005) (both holding that conditions requiring further definition from community corrections officers are unconstitutionally vague).

The lack of an explicit “knowing” requirement does not render a rule unconstitutional. The legislature can create rules lacking a mens rea element, such as unlawful possession of a controlled substance and the school bus stop enhancement for drug offenses. *State v. Bradshaw*, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004); *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). In an unlawful possession case, if the State proves the elements of the offense, the defendant can show unwitting possession, ameliorating the potential harshness of a strict liability crime. *Bradshaw*, 152 Wn.2d at 533 (quoting *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 373 (1981)). A condition prohibiting an offender from associating with drug users and drug sellers without an explicit knowing element is similar, and like unlawful possession, there is an opportunity to present a defense of unwitting violation of the rule. *Bradshaw*, 152 Wn.2d at 538; *State v. Llamas-Villas*, 67 Wn. App. 448, 455-56, 836 P.2d 239 (1992); RCW 9.94A.737; WAC 137-104-050.

A condition nearly identical to the one Defendant challenges has been held to be constitutional. In *State v. Llamas-Villa*, the defendant asserted the condition prohibiting him from association with persons using, possessing, or dealing with controlled substances was vague because it was not limited to individuals he *knew* to use, possess, or deal with controlled substances. *Llamas-Villa*, 67 Wn. App. at 455. The Court rejected this argument and held that the condition provides adequate notice of what conduct is prohibited and was neither overbroad or vague. *Id.* at 456. The Court explained that the statute allowing a court to prohibit contact with members of a specified class did not require the prohibition to be limited to those the criminal offender knows are members of the class. *Id.* at 455 citing RCW 9.94A.120(8)(c) (recodified as RCW 9.94A.505 and RCW 9.94A.703). In finding the condition constitutional, the court noted that if the defendant were arrested for violating the condition, he would have an opportunity to assert he did not know the individuals he was associating with were involved in using, possessing, or dealing controlled substances. *Id.* at 455-56.

Due process protections for alleged violations of community custody conditions include reversal of a sanction if it is not “reasonably related” to the violation, and a requirement an offender only be punished for a “volitional act.” RCW 9.94A.737(6)(d); *State v. Peterson*, 69 Wn.

App. 143, 147, 847 P.3d 538 (1993) (community custody sanction requires volitional act of noncompliance); *see also State v. Eaton*, 168 Wn.2d 476, 485, 229 P.3d 704 (2010) (recognizing that even strict liability offenses and penalties require a volitional act). This is consistent with *Arciniega v. Freeman*, where the United States Supreme Court held that a parolee prohibited from associating with other ex-convicts could not be punished for incidental contacts at his workplace stemming from his employer's hiring decisions. *Arciniega v. Freeman*, 404 U.S. 4, 92 S.Ct. 22, 22 (1971). Contrary to Defendant's argument, the law protects against arbitrary punishment for unknowing or unwitting contact with drug users and sellers.

When adequate standards against arbitrary enforcement exist, even highly restrictive conditions related to the goals of crime prevention and recovery from drug abuse are upheld. *Hearn*, 131 Wn. App. at 608. In *Hearn*, the defendant alleged the community custody condition restricting her from associating with known drug offenders, regardless of whether they were actively using drugs, was more restrictive than necessary to accomplish the State's needs. *Id.* In rejecting the challenge and finding the condition constitutional, the court noted that "[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders." *Id.* at 609.

Public policy supports broad and restrictive conditions for offenders on community custody and drug offenders in particular. "The recidivism rate of probationers is significantly higher than the general crime rate." *United States v. Knight*, 534 U.S. 112, 120, 122 S. Ct. 587 (2001). Drug abuse and opiod abuse in particular is a grave societal problem and is often devastating to an individual. *United Nations: Two-Thirds of global drug deaths now from opioids: UN drugs report*. ForeignAffairs, June 27, 2019. Requiring drug offenders in the strictest possible terms to exercise due diligence to ensure they are not engaging with drug users and drug sellers while on a limited period of community custody, has valid aims. It serves the needs of the State and public order in reducing crime as well as the needs of the individual offender in the great undertaking of escaping the damaging and potentially life-ending effect of controlled substances. *Warren*, 165 Wn.2d at 32; *see also Hearn*, 131 Wn. App. at 607.

In this case, Defendant was convicted of possessing heroin. As an offender on community custody, his constitutional rights are subject to infringement as authorized by the Sentencing Reform Act. *Hearn*, 131 Wn. App. at 607. Like in *Hearn*, the court in this case imposed a clear, broad, and strict prohibition related to his crime and recovery. *See Hearn*, 131 Wn. App. at 609. The plain language of the condition is clear to the

ordinary person and as well as to a community corrections officer charged with enforcement.

Defendant's reliance on *State v. Irwin* to argue this condition is unconstitutional is misplaced. In *Irwin*, the Court found the condition prohibiting the defendant from frequenting "areas where minor children are *known* to congregate" was unconstitutionally vague, as it required further guidance from a community custody officer to define what conduct is proscribed, which rendered the condition subject to arbitrary enforcement. *Irwin*, 191 Wn. App. at 655. The condition in *Irwin* was vague because children commonly congregate in a multitude of places. *Id.* at 654. The condition could be remedied by an illustrative list of prohibited locations. *Id.* at 655. In contrast, the condition prohibiting contact with "drug users and drug sellers" is plain on its face without the need for further interpretation of any term. Furthermore, should Defendant violate this condition, he will have an opportunity to assert a defense at a hearing with due process protections. *See Llamas-Villa*, 67 Wn. App. at 455-56; RCW 9.94A.737; WAC 137-104-050.

For Defendant, who told the court at sentencing he was "ready to get on with [his] life" and that "[b]eing an addict has held me back for some time now," the condition appropriately restricts him from people and circumstances that would interfere with his recovery and make a return to

crime more likely. 10/16/18 RP 14; *Hearn*, 131 Wn. App. at 609. The plain language of the condition provides adequate standards against arbitrary enforcement and the trial court did not abuse its discretion in imposing this condition. The State asks the Court to find the condition prohibiting Defendant from association with drug users and sellers is constitutional.

- c. Alternatively, the Court can read an implied knowing element into the condition prohibiting Defendant's association with drug users and drug sellers or remand the case for insertion of the word "known" into the condition.

Alternatively, this Court can read an implied knowing element into the condition that Defendant refrain from associating with drug users or drug sellers. *See United States v. Vega*, 545 F.3d 743, 750 (9th Cir. 2008). In *Vega*, the defendant challenged the condition prohibiting his association with any member of a criminal street gang, arguing he could be punished for associating with someone he did not know was a member of a gang. *Id.* at 749. The court found the condition presumed a knowing element consistent with *Staples v. United States*. *Id.* at 750, citing *Staples v. United States*, 511 U.S. 600, 605-06, 114 S. Ct. 1793 (1994). An implied knowing element is consistent with how community custody conditions are generally read to exclude inadvertent violations. *Peterson*, 69 Wn. App. at 147. So construed, the condition is not impermissibly vague.

If the Court declines to read an implied knowing element into the condition and finds the condition as written unconstitutionally vague, the Court should remand for the trial court to insert the word “known” into Defendant’s judgment and sentence prior to “drug users and drug sellers.” The remedy does not require striking the condition as Defendant requests.

The State asks the Court to reject Defendant’s challenge to the condition he “refrain from association with drug users and drug sellers” as unconstitutionally vague. The trial court did not abuse its discretion in imposing this condition that conveys to both an ordinary person and a community corrections officer what conduct is prohibited and contains adequate standards to protect against arbitrary enforcement. Should the Court find the condition vague, it can read an implied knowing element into the condition or remand the case for the trial court to insert the word “known” prior to “drug users and drug sellers.”

E. CONCLUSION.

The trial court did not abuse its discretion by imposing a condition requiring Defendant to refrain from associating with drug users and drug sellers. This condition is not unconstitutionally vague as it plainly conveys to an ordinary person what conduct is prohibited and includes adequate standards to protect against arbitrary enforcement. The trial court properly imposed this condition as part of the defendant’s community custody. The

State agrees that this Court should remand for the trial court to strike the condition from the judgment and sentence requiring substance abuse treatment from the Defendant's *taking a motor vehicle* case.

DATED: July 3, 2019

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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/3/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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