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NO. 52682-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DIORIO,

Appellant.

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

The Honorable Kevin D. Hull, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1) The sentencing court erred in calculating appellant's offender score for the felony conviction.

2) The sentencing court erred by imposing a felony sentence for a gross misdemeanor offense.

3) The sentencing court erred when it imposed a condition of community custody requiring the appellant to "[s]ubmit to a periodic polygraph and plethysmograph [(PPG)] exams at own expense at request of CCO or any treatment provider." CP 85.

Issues Pertaining to Assignments of Error

1) Did the sentencing court err in calculating appellant's offender score for his current felony attempted rape conviction by adding three points for his current gross misdemeanor conviction for communicating with a minor for immoral purposes?

2) Did the sentencing court err in treating appellant's current conviction for communicating with a minor for immoral purposes as a Class C felony conviction when appellant had not previously been convicted of a sex crime in this State or any other?

3) Did the sentencing court exceed its authority, and violate the appellant's constitutional rights, by requiring the appellant submit to PPG testing solely at the request of his CCO?

B. STATEMENT OF THE CASE

In October 2017, the Kitsap County Prosecutor charged appellant Anthony Diorio with second degree attempted rape of child (hereafter “attempted rape”) and communicating with a minor for immoral purposes (hereafter “CMIP”). CP 1-3; RCW 9A.44.076; RCW 9A.28.020(1); RCW 9.68A.090(2). The charges arose out of an October 2017 undercover operation conducted by the Washington State Patrol Missing and Exploited Children’s Task Force. CP 4-16; 1RP<sup>1</sup> 610, 614-17.

The prosecution charged the CMIP as a Class C felony instead of a gross misdemeanor based on an allegation that Diorio had “been previously convicted of communicating with a minor for immoral purposes or any felony sex offense under RCW 9A.68, 9A.44, or 9A.64, or of any other felony sexual offense in this or any other state . . . .” CP 3. The information fails to identify the nature of the alleged prior sex offense. Diorio was convicted as charged following a jury trial before the Honorable Kevin D. Hull, Judge. CP 49; 1RP 2-932.

Prior to sentencing on November 20, 2018, the Washington State Department of Corrections (DOC) submitted a Pre-Sentencing Investigation report. CP 52-63. It indicates Diorio has a 1999 “Child

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<sup>1</sup> There are six volumes of verbatim report of proceedings referenced as follows: **1RP** – five-volume consecutively paginated set for the dates of September 24-27 & October 1, 2018; and **2RP** – November 20, 2018 (sentencing).

Pornography” conviction from the “Military.” CP 54. The report state’s Diorio’s offender score is “6” for both the attempted rape and CMIP convictions. Id.

Diorio’s counsel submitted a presentence memorandum seeking a mitigated exceptional sentence. CP 75-80. In a memorandum counsel states, “even though Mr. Diorio has no documented criminal history, the multiple offense policy gives him an offender score of ‘3’ for [the attempted rape], which results in a sentencing range of 76.5 months to 102 months (75% of 102 to 136 months).” CP 75. The memorandum disputes DOC’s offender score calculation of “6.” CP 76. It notes the State failed to provide documentation of a prior “conviction” for Diorio. Id.

At sentencing, the prosecutor conceded he had been unable to substantiate the allegation that Diorio had previously been convicted of possessing child pornography. 2RP 3, 23. Unable to substantiate the prior conviction, the prosecutor conceded that it should not be used in calculating Diorio’s offender score and that DOC’s calculation of his offender score and standard range was incorrect. 2RP 4. The prosecutor requested the court impose the high end of the standard range of 102 months for the attempted rape. 2RP 4-5.

The sentencing court agreed it could not consider the allegation of child pornography possession levied but undocumented by the

prosecution, noting the lack of documentation made it impossible to determine whether it constitutes a prior conviction. 2RP 13. At that point, defense counsel told the sentencing court, “Effectively[,] Mr. Diorio comes to you with an offender score of zero. With a criminal history of zero.” 2RP 13. Later, counsel added, “All I’m asking the court to do is just remove the 3. To sentence Mr. Diorio as if he had an offender score of zero.” 2RP 15. Counsel argued that under that scenario, Diorio’s standard range would be “58 and a half to 76 and a half [months] is where you end up[,]” and then asked the court to impose 60 months. Id.

The sentencing court rejected both the defense request for a 60-month sentence and the prosecutor’s request for a 102-month sentence, and instead imposed 80 months for the attempted rape and 9 months for the CMIP. CP 82; 2RP 29-30. The court also imposed several conditions of community custody, including that Diorio,

[X] Submit to periodic polygraph and plethysmograph exams at own expense at request of CCO or any treatment provider.

[X] Complete a psychosexual evaluation and follow through with all treatment recommended by CCO and/or treatment provider.

CP 85.

Diorio appeals. CP 93.

C. ARGUMENTS

1. THE SENTENCING COURT MISCALCULATED DIORIO'S OFFENDER SCORE AND THEREBY IMPOSED SENTENCES IN EXCESS OF ITS AUTHORITY.

The sentencing court correctly refused to consider Diorio's discharge from the Navy in 1999 as a prior conviction. 2RP 13. But the court and the parties failed to recognize that without a prior sex offense conviction, the CMIP charge only constitutes a gross misdemeanor. As a gross misdemeanor, Diorio's CMIP conviction does not count towards his offender score for the attempted rape conviction and should have been sentenced as gross misdemeanor. When correctly assessed, Diorio's offender score for the attempted rape is zero, and the correct standard range is 58.5 to 76.5 months, as noted by Diorio's counsel at sentencing. 2RP 15. It also shows the CMIP conviction should have been punished as a gross misdemeanor instead of a Class C felony.

- (a) Diorio's CMIP conviction constitutes a gross misdemeanor, not a Class C felony.

The statute criminalizing CMIP provides:

- (1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic communication.

(3) For the purposes of this section, “electronic communication” has the same meaning as defined in RCW 9.61.260.

RCW 9.68A.090.

Under the statute, in order to constitute a felony, the prosecution must prove the defendant has previously been convicted under the statute or has a prior felony sex offense conviction. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008); State v. Sapp, 182 Wn. App. 910, 917, 332 P.3d 1058 (2014). Although an accused can stipulate to the existence of the predicate offense in order to avoid revealing it to the jury, the State must otherwise prove its existence beyond a reasonable doubt. Roswell, 165 Wn.2d at 193-94. Diorio never stipulated to the existence of the prior conviction.

Here, the prosecution concedes it cannot prove Diorio’s has the required predicate offense to convert his CMIP conviction from a gross misdemeanor to a Class C felony. 2RP 3, 23. Moreover, the prosecution

made no attempt to prove the existence of the predicate offense to the jury. Nor was the jury instructed it needed to make such a finding. See CP 44 & 46 (Instructions 13 & 15 respectively, defining CMIP and setting for the required elements, which do not include mention of a predicate offense).

Because the prosecution failed to prove Diorio has a prior CMIP conviction or a prior felony sex offense conviction, the current conviction for CMIP constitutes a gross misdemeanor and not a Class C felony. RCW 9.96A.090(1).

(b) Because Diorio's CMIP conviction is not a felony, his offender score for the attempted rape is zero.

Sentencing authority derives strictly from statute. State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). A sentencing court's failure to follow the dictates of the Sentencing Reform Act ("SRA") may be raised on appeal even if no objection was raised 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).

Offender score calculations are reviewed de novo. State v. Dunleavy, 2 Wn. App. 2d 420, 409 P.3d 1077, 1083, review denied, 190 Wn.2d 1027, 421 P.3d 457 (2018). The SRA directs courts to take three steps to correctly calculate an offender score: "(1) identify all prior

convictions; (2) eliminate those that wash out; [and] (3) ‘count’ the prior convictions that remain in order to arrive at an offender score.” State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010) (citing RCW 9.94A.525). With respect to the first step:

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

RCW 9.94A.500(1).<sup>2</sup> “Criminal history” means “the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere ...” and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(11). A “prior conviction” includes “other current offenses.” RCW 9.94A.525(1); RCW 9.94A.589(1)(a).

In most instances, only prior felony convictions count towards an offender score, but there are exceptions. See e.g., RCW 9.94A.525(2)(e) (directs that in prosecution for felony DUI, prior non-felony DUI's count as a point towards the current offender score). No such exception applies here.

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<sup>2</sup> Diorio's judgment and sentence lists “Poss of Child Porn” under the “Criminal History” section, but also states “not counted.” CP 81.

The prosecution failed to prove Diorio had any prior convictions and conceded as much. 2RP 3, 23. And as discussed, the prosecution's failure to prove a prior CMIP or felony sex offense conviction renders Diorio's current CMIP conviction a gross misdemeanor. RCW 9.68A.090(1).

The offender score for Diorio's attempted rape conviction is determined as if it were a completed crime. RCW 9.94A.525(6). Attempted rape is a "sex offense." RCW 9.94A.030(47)(a). As a "sex offense," the offender score is calculated by adding 3 points for any prior or current sex offenses. RCW 9.94A.525(17).

Diorio's current CMIP conviction is not a "sex offense," nor is it a felony. RCW 9.94A.030(47); RCW 9.68A.090(1). Therefore, it does not count towards his offender score for the attempted rape. RCW 9.94A.525(17).

It is apparent that the court and parties were confused about how to treat Diorio's alleged criminal past, which the State initially claimed included a prior conviction for CMIP or "other felony sexual offense," CP 3. When it was determined no such conviction could be proved, there was a collective failure to recognize the CMIP conviction therefore constituted only a gross misdemeanor that did not contribute to Diorio's offender score for the attempted rape. When properly calculated, Diorio's offender

score for the attempted rape conviction is zero. Because the sentencing court erroneously sentenced Diorio for the attempted rape based on an offender score of 3, remand for resentencing is appropriate. State v. Wilson, 170 Wn.2d 682, 690, 244 P.3d 950 (2010) (resentencing is remedy for miscalculated offender score).

2. THE SENTENCING COURT ERRED BY SENTENCING DIORIO FOR A FELONY CMIP CONVICTION.

As set forth above, Diorio's CMIP conviction constitutes a gross misdemeanor, not a Class C felony. See CP 81-82 (judgment and sentence list CMIP conviction as a "Felony," list an associated offender score of "3" and a standard range of "6.75 to 9 months"). As such, Diorio should have been sentenced under RCW 9.92.020, which sets forth the punishment for a gross misdemeanor. State v. Gailus, 136 Wn. App. 191, 201 n.8, 147 P.3d 1300 (2006), disapproved of on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). Under RCW 9.92.020, Diorio can be sentenced to serve "up to three hundred sixty-four days" in the "county jail." Remand to correct Diorio's sentence for the CMIP conviction is also appropriate.

3. THE REQUIREMENT THAT DIORIO SUBMIT TO PPG TESTING AT THE REQUEST OF HIS CCO IS ILLEGAL AND SHOULD BE STRICKEN.

The trial court's authority to impose sentence in a criminal case is strictly limited to that authorized by the legislature in the sentencing statutes. Johnson, 180 Wn. App. at 325. Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326.

Diorio did not agree to the community custody conditions. Regardless, "a defendant cannot agree to a sentence which the court does not have the statutory authority to impose." State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). Similarly, defense counsel did not object to the improper condition below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

As a condition of community custody, sentencing courts may order offenders to "[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). A "crime-related prohibition" must "directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Substantial evidence must support this determination. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830

(2015). Where “there is no evidence in the record linking the circumstances of the crime to the condition,” the reviewing court must strike the challenged condition. State v. Padilla, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

A sentencing condition that limits an offender’s fundamental rights must be more than just crime-related. Bahl, 164 Wn.2d at 757. A condition that touches upon constitutional rights “must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Id. Put another way, the condition “must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. at 758.

A trial court also abuses its discretion if it imposes an unconstitutional condition. Padilla, 190 Wn.2d at 677. A community custody condition is unconstitutionally vague if (1) it is not sufficiently definite such that ordinary people can understand what conduct is proscribed; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id.

The condition here pertaining to plethysmograph examinations violates Diorio’s constitutional right to be free from bodily intrusions. It requires Diorio to “[s]ubmit to periodic polygraph and plethysmograph

exams at own expense at request of CCO or any treatment provider.” CP 85.

A sentencing court may impose conditions to monitor compliance with court orders, such as polygraph testing or random urinalyses. State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007). Plethysmograph testing, however, “is extremely intrusive,” and may violate the offender’s constitutional right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). As such, the testing can be ordered only “incident to crime-related treatment by a qualified provider.” Id. It may not be used “as a routine monitoring tool subject only to the discretion of a community corrections officer.” Id.

This Court has recognized “plethysmograph testing can only be used for treatment purposes.” State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230 (2014). Here, the trial court ordered Diorio to obtain a sexual deviancy evaluation and follow all treatment recommendations. CP 85. But the “periodic polygraph and plethysmograph exams” condition does not limit the CCO’s discretion to treatment purposes. Rather, it broadly allows the CCO to direct Diorio to submit to plethysmograph examinations.

This Court should remand for the trial court to either strike the condition or specify “the CCO’s scope of authority is limited to ordering

plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes.” Johnson, 184 Wn. App. at 781; accord State v. Alcocer, 2 Wn. App. 2d 918, 925, 413 P.3d 1033 (2018) (“Upon remand, the court should clarify that the plethysmograph should only be used at the direction of the sexual deviancy evaluator and/or treatment provider.”), overruled on other grounds by State v. Johnson, 4 Wn. App. 2d 352, 421 P.3d 969 (2018).

D. CONCLUSION

For the reasons presented, remand for resentencing on both of Diorio’s convictions is required.

DATED this \_\_\_ day of May, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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