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Court of Appeals
Division II
State of Washington
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NO. 52848-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN FREDERICK FLYNN, III,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 93-1-04150-2

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

 A. Does Flynn improperly attempt to collaterally attack his judgment and sentence when he asks this Court to review irrelevant conditions of his 2016 sentence in an appeal of the court’s decision in a 2018 violation hearing?..... 2

 B. Did the trial court properly sanction Flynn for violations of conditions properly imposed under RCW 9.94A.120 (1993) and affirmative requirements set by DOC as permitted by the 1997 amendments to that statute? 2

 C. Was counsel ineffective for strategically stipulating to Flynn’s violations of lawfully-imposed conditions and focusing on mitigation of the resulting sanctions? 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT..... 5

 A. FLYNN IMPROPERLY ATTEMPTS TO COLLATERALLY ATTACK CONDITIONS OF SENTENCE THAT WERE NOT A BASIS OF THE VIOLATION RULING ON REVIEW 5

B. THE TRIAL COURT PROPERLY SANCTIONED FLYNN FOR VIOLATIONS OF VALID CONDITIONS IMPOSED UNDER FORMER RCW 9.94A.120 AND THE LAWFUL REQUIREMENT HE PERFORM AFFIRMATIVE ACTS TO MONITOR COMPLIANCE..... 7

C. FLYNN’S COUNSEL WAS NOT INEFFECTIVE FOR STIPULATING TO VIOLATIONS OF LAWFULLY-IMPOSED CONDITIONS..... 12

V. CONCLUSION..... 14

TABLE OF AUTHORITIES

State Cases

<i>In re Capello</i> , 106 Wn. App. 576, 24 P.3d 1074 (2001).....	9
<i>State v Blair</i> , 191 Wn.2d 155, 421 P.3d 937 (2018).....	5
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	12
<i>State v. Gaut</i> , 111 Wn. App. 875, 46 P.3d 832 (2002).....	6
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011), <i>declined to follow by United States v. Herzog</i> , 798 F.3d 840, 846 (9 th Cir 2015).....	12
<i>State v. Larranaga</i> , 126 Wn. App. 505, 108 P.3d 833 (2005).....	6
<i>State v. Maples</i> , 171 Wn. App. 44, 286 P.3d 386 (2012).....	10
<i>State v. McClinton</i> , 186 Wn. App. 826, 347 P.3d 889 (2015).....	10, 11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	12
<i>State v. Medina</i> , 180 Wn.2d 282, 324 P.3d 682 (2014).....	7
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998) <i>abrogated on other grounds by State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2015).....	9
<i>State v. Schwab</i> , 141 Wn. App. 85, 167 P.3d 1225 (2007).....	6
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	12

Federal and Other Jurisdiction

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12
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Statutes

1993 Wash.Legis.Serv.Ch. 31 (H.B. 1578)	7
Former RCW 9.94A.120.....	7
Laws 2001, ch. 10, § 6	7
RCW 10.73.090	6
RCW 9.94A.030.....	9, 10
RCW 9.94A.120.....	7, 9, 10, 11
RCW 9.94A.120 (1993).....	1, 2, 7, 9, 10, 11
RCW 9.94A.120(12) (1993)	9, 11
RCW 9.94A.120(8)(b)	10
RCW 9.94A.120(8)(b) (1993).....	7
RCW 9.94A.120(8)(b)(i) (1993).....	11
RCW 9.94A.120(8)(b)(i)-(vi) (1993).....	8
RCW 9.94A.120(8)(b)(vi)	11
RCW 9.94A.120(8)(c)	10
RCW 9.94A.120(8)(c)(i)-(v) (1993).....	9
RCW 9.94A.120(8)(c)(iii) (1993).....	11
RCW 9.94A.120(8)(c)(iv) (1993).....	10
RCW 9.94A.505.....	7
RCW 9.94A.704.....	3
RCW 9.94A.706.....	3

Rules and Regulations

RAP 2.4(a) 5

RAP 5.2(a) 5

I. INTRODUCTION

The defendant John Flynn was convicted and sentenced for rape in the first degree and burglary in the first degree in 1994. Flynn was re-sentenced in 2016 after identification of errors in his offender score. Flynn was released from custody in 2018 and subsequently violated multiple conditions of his community placement.

The trial court considered nine of these violations at a hearing on December 7, 2018, and imposed a 120-day sanction. The court's ruling was based on Flynn's violations of valid community placement conditions imposed under the 1993 version of RCW 9.94A.120 as well as the lawful requirement Flynn abide by affirmative requirements set by DOC to monitor his compliance with court orders. Flynn appealed that decision.

Flynn wrongly alleges his counsel was ineffective for stipulating to his violations and focusing on minimizing his sanction. He also improperly attempts to re-visit the validity of his underlying judgment and sentence by challenging sentencing conditions irrelevant to the December 7, 2018, violation hearing. The State asks this Court to deny Flynn's claims.

II. RESTATEMENT OF THE ISSUES

- A. Does Flynn improperly attempt to collaterally attack his judgment and sentence when he asks this Court to review irrelevant conditions of his 2016 sentence in an appeal of the court's decision in a 2018 violation hearing?
- B. Did the trial court properly sanction Flynn for violations of conditions properly imposed under RCW 9.94A.120 (1993) and affirmative requirements set by DOC as permitted by the 1997 amendments to that statute?
- C. Was counsel ineffective for strategically stipulating to Flynn's violations of lawfully-imposed conditions and focusing on mitigation of the resulting sanctions?

III. STATEMENT OF THE CASE

On March 4, 1994, a jury found the defendant, John Flynn, guilty of a 1993 rape in the first degree and burglary in the first degree. CP 1-4, 277-78. Flynn was sentenced to 280 months in the Department of Corrections (DOC). CP 13. His sentence was based on a calculated offender score of 13 for the rape conviction and 12 for the burglary conviction. CP 9. The court imposed two years of community placement pursuant to statute. CP 13-15.

Flynn filed a personal restraint petition alleging incorrect calculation of his offender score based on the inclusion of convictions in his criminal history that were not his. CP 279. The State conceded errors in Flynn's criminal history compilation. *Id.* On July 1, 2016, the Washington Supreme Court remanded Flynn's case to the trial court for a determination of his offender score and re-sentencing. CP 280.

Re-sentencing took place on October 21 and 24, 2016. CP 28-43, RP (10/24/16) 2. The trial court found that Flynn's offender score was 8 for the rape conviction and 7 for the burglary conviction based on his confirmed prior criminal convictions for robbery in the second degree, rape in the second degree, and theft in the second degree. CP 32, RP (10/24/16) 2. This recalculation resulted in a range of 185 to 245 months for the rape conviction and a range of 67 to 89 months for the burglary conviction. CP 32. The court sentenced Flynn to 240 months, close to the high end of the standard sentencing range. CP 35, RP (10/24/16) 23. Flynn's sentence on the burglary charge was 89 months concurrent to the rape sentence. CP 35.

The trial court imposed two years of community placement to be served after Flynn's release from custody. CP 36, RP (10/24/16) 24. The court ordered Flynn to abide by a number of conditions while on supervision. CP 36, RP (10/24/16) 24. The conditions included performing affirmative acts to confirm compliance with court orders, enrollment in electronic monitoring if ordered by Department of Corrections (DOC), compliance with any additional conditions imposed under RCW 9.94A.704 and RCW 9.94A.706, observance of any crime-related prohibitions dictated by the community corrections officer (CCO), and "per cco." CP 36-7, 40, 42, RP (10/24/16) 24-5. Flynn filed a notice of appeal after re-sentencing. CP 567-74. His appeal was dismissed. CP 575-76.

Following the re-sentencing, Flynn was transferred to the Special Commitment Center for evaluation for civil commitment. CP 89, RP (6/18/18) 18. He did not meet the criteria for commitment as a sexually violent predator due to lack of mental abnormality or personality disorder. CP 136. He was released after agreeing to abide by various conditions in the community to include participation in sex offender treatment. CP 468, RP (6/18/18) 18, 87-8.

Flynn's term of community placement began on February 22, 2018, the day of his release from custody. RP (6/18/18) 28, CP 473. In October 2018, DOC alleged Flynn had violated his conditions by consuming alcohol. CP 105, 152. In November 2018, DOC alleged further violations, including that Flynn had failed to abide by his curfew, failed to report to DOC, and failed to comply with a urinalysis. CP 151. The State filed a petition for a hearing to determine noncompliance, asserting the following nine violations based on reports from DOC:

- (1) consuming alcohol on or about 10/15/18;
- (2) consuming alcohol on or about 10/22/18;
- (3) failure to abide by curfew on 11/17/18;
- (4) failure to report as directed to CCO on 11/19/18;
- (5) failure to be available for urinalysis on 11/19/18;

- (6) failing to report to DOC as directed since on or about 11/26/18 and 11/27/18;
- (7) failing to comply with curfew on or about 11/26/18;
- (8) failure to be available for urinalysis testing since on or about 11/26/18; and
- (9) failing to attend sexual deviancy treatment for the last several weeks.

CP 208-09.

The court addressed these violations on December 7, 2018. CP 210-211. Flynn stipulated to all nine violations, and the parties argued as to the appropriate sanction. CP 210-11, RP (12/7/18) 1-2, 4-5, 9. The court imposed 120 days as a sanction for all of the violations. CP 210-11, RP (12/7/18) 14. Flynn timely appealed the court's ruling. CP 256-57.

IV. ARGUMENT

A. FLYNN IMPROPERLY ATTEMPTS TO COLLATERALLY ATTACK CONDITIONS OF SENTENCE THAT WERE NOT A BASIS OF THE VIOLATION RULING ON REVIEW

Flynn improperly attempts to collaterally attack conditions of his 2016 sentence irrelevant to the court's ruling at the 2018 violation hearing. A notice of appeal must be filed within 30 days after entry of the decision the party filing the notice wants reviewed. RAP 5.2(a). The appellate court will review the decision designated by the appellant in the notice of appeal. RAP 2.4(a). A trial court's imposition of sentence is reviewed for abuse of discretion. *State v Blair*, 191 Wn.2d 155, 159, 421 P.3d 937 (2018).

A party may not use an appeal of a limited issue to attack the validity of an underlying judgment and sentence where the time to appeal the judgment and sentence has expired. *See State v. Gaut*, 111 Wn. App. 875, 880-81, 46 P.3d 832 (2002) (assignments of error on appeal of denial of motion to withdraw guilty plea were improper attack of underlying judgment and sentence); *see also State v. Schwab*, 141 Wn. App. 85, 94, 167 P.3d 1225 (2007) (appellant not entitled to review of 2004 plea hearing in appeal of 2006 hearing on motion to withdraw insanity plea); *see also State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005) (“an unappealed final judgment cannot be restored to an appellate track by filing a motion under CrR 7.8 and appealing the denial of a motion.”)

Flynn now appeals the trial court’s decision at the violation hearing on December 7, 2018. The scope of Flynn’s appeal is thereby limited to the sentencing conditions at issue at the violation hearing and the ensuing sanctions. Flynn cannot use this appeal to challenge the validity of conditions in his underlying sentence not relevant to the limited scope of this appeal. If Flynn now wishes to challenge his underlying sentence, he must do so by collateral attack. RCW 10.73.090.

Flynn asks this Court to evaluate five community placement conditions in his judgment and sentence. Br. of Appellant at 12. Only two of those conditions, performing affirmative acts to confirm compliance with

the orders of the court, and submission to electronic monitoring if imposed by DOC, are relevant to Flynn's appeal. The State asks this Court to consider only those conditions properly before it on appeal and to deny Flynn's request to address irrelevant sentencing conditions not properly before the Court.

B. THE TRIAL COURT PROPERLY SANCTIONED FLYNN FOR VIOLATIONS OF VALID CONDITIONS IMPOSED UNDER FORMER RCW 9.94A.120 AND THE LAWFUL REQUIREMENT HE PERFORM AFFIRMATIVE ACTS TO MONITOR COMPLIANCE

The trial court's December 7, 2018, sanction of Flynn arose from his multiple violations of valid community placement conditions imposed pursuant to RCW 9.94A.120 (1993) and lawful affirmative requirements of supervision imposed by DOC. An offender is sentenced according to the version of the Sentencing Reform Act in effect at the time a crime is committed. *State v. Medina*, 180 Wn.2d 282, 287, 324 P.3d 682 (2014). RCW 9.94A.120 (1993) controlled the imposition of sentence and community placement conditions for felony offenses committed in October 1993.¹ Sex offenders sentenced to the statutory maximum period of confinement at that time were required to serve two years of community placement following incarceration. RCW 9.94A.120(8)(b) (1993). Unless

¹ The version of RCW 9.94A.120 in effect in October 1993 followed the 1993 Wash.Legis.Serv.Ch. 31 (H.B. 1578), effective date July 25, 1993. RCW 9.94A.120 was recodified as RCW 9.94A.505 by Laws 2001, ch. 10, § 6.

waived, courts were required to impose the following community placement conditions specific to offenders supervised for a sex offense:

- (i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (ii) The offender shall work at department of corrections-approved education, employment, and/or community service;
- (iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;
- (iv) An offender in community custody shall not unlawfully possess controlled substances;
- (v) The offender shall pay supervision fees as determined by the department of corrections; and
- (vi) The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

RCW 9.94A.120(8)(b)(i)-(vi) (1993). The court was also authorized to order any of the following special conditions:

- (i) The offender shall remain within, or outside of, a specified geographical boundary;
- (ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (iii) The offender shall participate in crime-related treatment or counseling services;
- (iv) The offender shall not consume alcohol; or

(v) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.120(8)(c)(i)-(v) (1993).

Sex offenders were also required to abide by the general conditions of DOC for felony offenders. RCW 9.94A.120(12) (1993). These included reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of changes in address or employment, and paying the supervision fee and assessment. *Id.*

The trial court had exclusive authority to set conditions of community placement for sex offenders under the version of RCW 9.94A.120 in effect in 1993. *In re Capello*, 106 Wn. App. 576, 584-85, 24 P.3d 1074 (2001). In 1996, the statute was amended to allow both the court and DOC to impose conditions for offenders on community custody. *Id.* This legislation applied to offenders sentenced after its enactment. *Id.*

Further amendment to RCW 9.94A.030 and RCW 9.94A.120 in 1997 authorized the court to order an offender to engage in affirmative acts to monitor compliance with conditions. *State v. Riles*, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998) *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 795, 239 P.3d 1059 (2015). The Washington Supreme Court found these amendments to be clarifying rather than changing

existing law, and thus they applied retroactively to offenders whose offenses took place before the amendments. *Id.*, at 343. Accordingly, a sentencing court may order an offender to perform affirmative acts as required by DOC for crimes committed before the 1997 legislative changes to RCW 9.94A.120. *State v. Maples*, 171 Wn. App. 44, 51, 286 P.3d 386 (2012).

Appellate courts have upheld DOC's imposition of affirmative conditions to offenders sentenced for offenses taking place prior to the 1997 amendments to RCW 9.94A.030 and RCW 9.94A.120. In *State v. McClinton*, Division I affirmed DOC's imposition of GPS monitoring to assure an offender sentenced for a 1995 offense complied with his court-imposed conditions of community placement. *State v. McClinton*, 186 Wn. App. 826, 827, 347 P.3d 889 (2015). In *State v. Maples*, Division II upheld the condition requiring an offender to perform affirmative acts as required by DOC for a 1988 offense. *Maples*, 171 Wn. App. at 50.

The conditions at issue at the December 7, 2018, violation hearing were either directly authorized by RCW 9.94A.120 (1993) or were affirmative conditions established to monitor Flynn's compliance with court orders. Five of the violations stemmed from conditions expressly authorized by RCW 9.94A.120(8)(b) and (8)(c). RCW 9.94A.120(8)(c)(iv) (1993) authorized the court to prohibit the consumption of alcohol (violations one

and two). RCW 9.94A.120(8)(b)(i) (1993) authorized the court to order an offender to report as directed to DOC (violations four and six). RCW 9.94A.120(8)(c)(iii) (1993) authorized the court to order an offender to participate in treatment (violation nine).

The remaining four violations stemmed from lawful affirmative requirements set by DOC. Flynn's curfew was an affirmative condition set to monitor compliance with court-ordered conditions such as his living arrangements (violations three and seven). It is also related to DOC's authority to order an offender under RCW 9.94A.120(12) (1993) to remain within prescribed geographical boundaries, even though that condition is not included in Flynn's judgment and sentence. RCW 9.94A.120(8)(b)(vi); CP 36, 42. DOC's use of GPS to monitor Flynn's movements is a valid affirmative requirement to assure compliance with court orders. *McClinton*, 186 Wn. App. at 836. The requirement Flynn comply with urinalysis tests was an affirmative condition set to monitor the prohibitions on alcohol and drug use (violations five and eight). RCW 9.94A.120; CP 36, 42.

The trial court did not err in imposing sanctions on Flynn for violating multiple valid conditions of his community placement. All of the conditions at issue stemmed directly from RCW 9.94A.120 (1993) or lawful affirmative conditions imposed by DOC to assure compliance with court

orders. This Court should find that the trial court did not abuse its discretion in holding Flynn responsible for his violations.

C. FLYNN'S COUNSEL WAS NOT INEFFECTIVE FOR STIPULATING TO VIOLATIONS OF LAWFULLY-IMPOSED CONDITIONS

Flynn's counsel strategically stipulated to Flynn's violations and argued for lesser punishment. To prevail on an ineffective assistance of counsel claim, a defendant must prove that (1) counsel's representation was deficient, and (2) the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Counsel's performance is presumed to be reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), *declined to follow by United States v. Herzog*, 798 F.3d 840, 846 (9th Cir 2015). Trial counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance is not shown by matters that go to strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). If any error occurred, prejudice only exists if the result of the proceeding would have been different absent the error. *McFarland*, 127 Wn.2d at 335.

Flynn cannot show his counsel was deficient for refraining from challenging the lawful conditions giving rise to his sanctions. Stipulating to the violations was a proper strategic choice to avoid the admission of additional prejudicial information regarding Flynn's conduct and maintain credibility to most effectively argue for a mitigated sanction. Even if some other conditions imposed at the 2016 re-sentencing were unlawful, counsel was under no obligation to bring up these unrelated conditions at the December 7, 2018, violation hearing. Counsel effectively and strategically focused the court on the appropriate sanction for Flynn's conduct by asking for credit for time served. RP (12/7/18) 9.

Flynn cannot show that any prejudice resulted from counsel's strategy at the violation hearing. Even if the curfew condition was unlawful, as he argues on appeal, Flynn has not demonstrated the court would have imposed less than 120 days for the remaining violations. The court noted that the December 7, 2018, violation hearing was the third such hearing during Flynn's supervision. RP (12/7/18) 13-14. The court told Flynn he had been given every chance to abide by his conditions but this time the court was going to follow DOC's recommendation. *Id.* Given these circumstances, Flynn cannot show that even if one or more of his conditions was unlawful, the court would not have sentenced him to 120 days. This

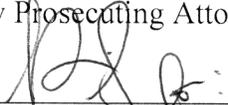
Court should find that counsel was not ineffective in stipulating to his violations at the December 7, 2018, hearing.

V. CONCLUSION

The trial court did not abuse its discretion in sanctioning Flynn for multiple violations of his valid community placement conditions. His counsel was not ineffective for strategically refraining from objection to his lawful conditions and attempting to mitigate his punishment. Flynn improperly attempts to attack conditions of his sentence unrelated to the properly appealed 2018 violation hearing. This Court should deny Flynn's claims.

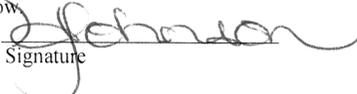
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The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate 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.

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PIERCE COUNTY PROSECUTING ATTORNEY

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