

FILED
Court of Appeals
Division II
State of Washington
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NO. 53155-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CASEY GREEN,

Appellant.

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

The Honorable John C. Skinder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court imposed a vague community custody condition prohibiting Casey Green from associating with people who use, sell, possess, or manufacture controlled substances with no regard to whether those people possess those substances legally.

2. The judgment and sentence improperly authorizes interest to accrue on Casey Green's unpaid, non-restitution, legal financial obligations.

3. The judgment and sentence includes a scrivener's error which specifies gross misdemeanors are subject to a maximum 365 day sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Conditions of community custody cannot be unconstitutionally vague. A vague condition fails to (1) give ordinary people fair warning of proscribed conduct; and (2) have standards definite enough to protect against arbitrary enforcement. Is the community custody condition forbidding Casey Green from associating with those who use, sell, possess or manufacture controlled substances vague because it fails to specify if the condition applies to people who, for example, legally possess controlled substances via prescription or through their employment in

medical-related fields, thus subjecting Casey Green to arbitrary enforcement?

2. By statute, interest does not accrue on unpaid legal financial obligations other than restitution. Yet, Casey Green's judgment and sentence authorizes the accrual of interest on Casey Green's non-restitution legal financial obligations. Must Casey Green's case be remanded to strike the improper interest accrual provision?

3. A defendant is entitled to a judgment and sentence free of scrivener's errors. Casey Green's judgment and sentence includes a scrivener's error specifying the maximum sentence on a gross misdemeanor is 365 days when, instead, the maximum penalty is 364 days. Must Casey Green's judgment and sentence be amended to delete the scrivener's error?

C. STATEMENT OF THE CASE

Casey Green¹ contacted his brother, Damion Green, and asked him for a ride to a local food bank. RP² 48. Damion³ agreed. RP 48.

When driving Casey home from the food bank, the brothers discussed Casey's struggle with drugs and Casey's relationship with his daughter. RP 49-50. Casey became increasingly upset and combative during the drive and yelled at Damion. RP 50. As soon as they arrived at Casey's home, Casey shoved Damion. RP 50. Damion feared Casey intended to punch him. RP 50.

Casey got out of Damion's car and started to smack the trunk lid until he put a dent in it. RP 51. When Damion flippantly said "nice dent," Casey took his anger out on the car. Among other things, he dented the car's roof, broke the passenger windows, busted off a side mirror, scratched the front windshield, and caved in a door. RP 52-53.

¹ The appeal talks about the two Green brothers, Casey and Damion. In this brief, the brothers are referred to by their first names to avoid confusion. No disrespect is intended.

² RP is the verbatim report of proceedings for the combined volume containing the trial held on December 17-18, 2018. Any other report of proceedings are referenced as "RP" followed by the specific date.

³As the brother have the same last name, Damion Green is referred to by his first name for clarity sake.

Casey left after taking his belongings from the car's trunk. RP 54.

Damion called the police. RP 54, 82.

The police went to Damion's home. They saw Casey lying under a blanket by the front door. RP 32. Casey jumped up and approached the police and told them to put a bullet in his head. RP 33, 92. The police struggled to get Casey under control. RP 36-38, 93. Ultimately, one of the officers ordered his K9 to subdue Casey. RP 103, 111-12. The dog bit Casey's calf which caused Casey to stop struggling. RP 39-40, 112. Casey went to the hospital by ambulance for care for the wounds inflicted by the dog bite. RP 96-97, 117.

Damion, who works at an auto body shop, enlisted Nicholas Emery, a co-worker, to estimate the damage done to his car. RP 56, 63. Emery estimated the repair cost to Damion's car as \$6891.68. RP 67-68, 78.

The state charged Casey with two counts of assault in the third degree based on his interaction with the police when they came to arrest him. CP 10-11. The state also charged Casey for assault in the fourth degree on Damion and malicious mischief in the first degree for damaging the car. CP 10-11.

A jury acquitted Casey on both third-degree assault charges. CP 15-16; RP 198. The jury did, however, find Casey guilty of both the assault on Damion and the malicious mischief on Damion's car. CP 17-18; RP 198.

The court sentenced Casey to 90 concurrent days on both the malicious mischief and the assault. RP 12/21/18 at 11; CP 21-22. The court suspended the balance of Casey's misdemeanor 364 maximum sentence for 24 months contingent on Casey abiding by community custody conditions for 24 months. RP 12/21/18 11; CP 22.

One such community custody condition obligated Casey to "not associate with those who use, sell, possess, or manufacture controlled substances." CP 35. Casey did not object to the condition. RP 12/21/18 at 10-13. The court also imposed financial obligations to include \$6891.68 in restitution, a \$500 victim assessment, and a \$100 DNA fee. RP 12/21/18 at 9; CP 36-37.

The court ordered that the interest on the non-restitution LFOs bear interest from the date of entry of the judgment and sentence at the rate applicable to civil judgments. CP 37.

Casey appeals his judgment and sentence. CP 30.

D. ARGUMENT

Issue 1: The broad community custody condition prohibiting Casey Green from associating with people who use, sell, possess, or manufacture controlled substances, even if it is legal for them to do so, is vague, overbroad, and subjects Casey to arbitrary enforcement.

The prohibition against Casey associating with people who merely use, sell, possess, or manufacture controlled substances is too broad and too vague, thus subjecting Casey to arbitrary enforcement. It must be stricken.

The due process vagueness doctrine requires that citizens have fair warning of proscribed behavior. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A community custody condition does not provide fair warning if (1) “it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition” or (2) “it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 679, 425 P.3d 847 (2018). It is not necessary that a condition provide “complete certainty the exact point at which his actions would be classified as prohibited conduct.” *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

Conditions of community custody may be challenged for vagueness for the first time on appeal. *Padilla*, 190 Wn. at 677. Courts review a community custody condition for abuse of discretion and will reverse if the condition is manifestly unreasonable. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). A trial court necessarily abuses its discretion by imposing an unconstitutionally vague community custody condition. *Padilla*, 190 Wn.2d at 677.

The trial court abused its discretion in imposing an unconstitutionally vague condition. The vague condition prohibits Casey, while on community custody, from associating with people who merely use, sell, or possess a controlled substance. See list of controlled substances in RCWs 69.50.204, 69.50.206, 69.50.208, 69.50.210, and 69.50.212. Controlled substances find legitimate use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals. RCW 69.50.101(o).

People routinely consume controlled substances through legitimate prescriptions. The court condition prohibits Casey from associating with otherwise pro-social people merely because they have a prescription for controlled substances such as birth control, heart medication, gout medication, asthma inhalers, and horse antibiotics.

The vague condition does not provide Casey with “sufficiently ascertainable standards to protect against arbitrary enforcement.” *Padilla*, 190 Wn.2d at 677. With this broad, arbitrary community custody condition, Casey is an open book for arbitrary community custody violations. His case should be remanded to strike the condition.

Issue 2: Casey Green’s case should be remanded to the trial court to correct the maximum sentence scrivener’s error on the judgment and sentence.

The trial court erred in listing Casey’s gross misdemeanor assault in the fourth-degree conviction as having a maximum sentence of 365 days in custody. Casey’s judgment and sentence should be remanded to correct the scrivener’s error.

Scrivener’s errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. Clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. *State v. Coombes*, 191 Wn. App. 241, 255, 361 P.3d 270 (2015); *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

At section 2.3 of the judgment and sentence, the maximum term for count 4, assault in the fourth degree, is listed as “1 year.” CP 21. In reality, the maximum term is 364 days, one day shy of a year. RCW

9A.20.021(2). The Laws of 2011, ch. 96, reduced the maximum sentence for gross misdemeanors by one day, from a maximum of one year to a maximum of 364 days.

The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). This court should remand Casey's judgment and sentence for correction.

Issue 3: The court must modify Casey Green's judgment and sentence to eliminate interest accrual on the non-restitution legal financial obligations.

In 2018, the legislature amended former RCW 10.82.090 to prohibit interest accrual on non-restitution LFOs as of June 7, 2018. Laws of 2018, ch. 269, § 1.

The court sentenced Casey Green on December 21, 2018, well after the amended law went into effect. RP 12/21/18; CP 19. At sentencing, the court failed to strike the following paragraph:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.

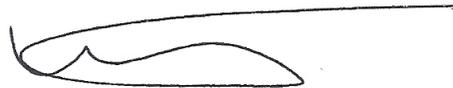
CP 37. The court imposed a \$500 victim assessment and a \$100 DNA fee. The court also imposed a \$6891.68 restitution obligation. Legally, restitution bears interest, but the mandatory LFOs do not. Because the

court failed to strike the boilerplate interest language from the judgment and sentence, Casey is subject to improper interest accrual on the \$600 mandatory LFOs. Remand to strike any accrued and accruing interest is required. *State v. Ramirez*, 191 Wn.2d 732, 746-47, 426 P.3d 714 (2018).

E. CONCLUSION

On remand, the court should strike the vague community custody condition prohibiting Casey Green from associating with people who use, sell, possess or manufacture controlled substances, and correct the maximum sentence scrivener's error and the accruing interest on the \$600 mandatory LFOs.

Respectfully submitted September 2, 2019.



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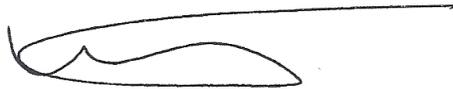
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Casey Green, 11511 Clark Road SE, Yelm, WA 98597.

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

Signed September 2, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
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LAW OFFICE OF LISA E TABBUT

September 02, 2019 - 11:30 AM

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