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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 ALAN GREEN,

Appellant.

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

The Honorable John C. Skinder, Judge
Cause No. 18-1-01656-34

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

 1. The probationary condition that Green not associate with those who use, sell, possess, manufacture or deliver controlled substances is not unconstitutionally vague 1

 2. The State has no objection to correcting a scrivener’s error. 5

 3. The State does not oppose amending the interest provision for legal financial obligations to comply with RCW 10.82.090 5

D. CONCLUSION..... 6

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Bahl,
164 Wn.2d 739, 193 P.3d 678 (2008) 2

State v. Padilla,
190 Wn.2d 672, 416 P.3d 712 (2018) 2

State v. Sanchez Valencia,
169 Wn.2d 782, 239 P.3d 1059 (2010) 2

Decisions Of The Court Of Appeals

In re Pers. Restraint of Brettell,
6 Wn.App.2d 161, 430 P.3d 677 (2018) 3-4

State v. Brown,
No. 75458-1-I (Wash Ct. App. March 12, 2018) 3

State v. Houck,
9 Wn.App.2d 636, 446 P.3d 646 (2019) 2-3

U.S. Supreme Court Decisions

United States v. Vega,
545 F.3d 743, (9th Cir. 2008) 3-4

Statutes and Rules

U.S. Const. amend. XIV 2

WASH Const. art. 1 § 3 2

RCW 9A.20.021(2) 5

RCW 10.73.160 6

RCW 10.82.090 1, 5-7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a community custody condition that prohibits association with those who use, sell, possess, manufacture or deliver controlled substances is unconstitutionally vague.

2. Whether a scrivener's error indicating maximum sentence for the gross misdemeanor offense of assault in the fourth degree as "1 year" should be corrected to reflect the maximum sentence of 364 days.

3. Whether outdated boilerplate language included in the judgment and sentence regarding interest on nonrestitution legal financial obligations should be modified to reflect the change in RCW 10.82.090 that went into effect on June 7, 2018.

B. STATEMENT OF THE CASE.

The State generally accepts the Statement of the Case included in the Brief of Appellant as sufficient for consideration of the issues raised.

C. ARGUMENT.

1. The probationary condition that Green not associate with those who use, sell, possess, manufacture or deliver controlled substances is not unconstitutionally vague.

Appellate courts review a community custody condition for abuse of discretion and will reverse only if the condition is manifestly unreasonable. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A trial court abuses its discretion when it imposes a community custody term that is unconstitutionally vague. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). The due process vagueness doctrine requires that citizens have fair warning of proscribed behavior. U.S. Const. amend. XIV; WASH Const. art. 1 § 3; State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A community custody condition that does not provide fair warning is unconstitutionally vague. Id. at 753. A condition does not provide a fair warning if “it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition” or “it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” Padilla, 190 Wn.2d at 677.

Recently, this Court considered whether a condition that prohibits an offender from associating with known drug users or sellers is unconstitutionally vague. State v. Houck, 9 Wn.App.2d 636, 643-645, 446 P.3d 646 (2019). This Court held, “the condition prohibiting association with known drug users/sellers is not

unconstitutionally vague.” Id. at 645 (internal quotations omitted). In so ruling, this Court considered the holding of United States v. Vega, 545 F.3d 743, 749 (9th Cir. 2008), in which the Ninth Circuit Court of Appeals rejected a vagueness challenge to a condition prohibiting association with any member of any criminal street gang. Houck, 9 Wn.App. 2d at 644-645. The Ninth Circuit noted that incidental contacts do not constitute association and opined that the condition was constitutional but could be improved by the inclusion of the term “known.” Vega, 545 F.3d at 749-750.

Division I of this Court considered a vagueness challenge to a condition that prohibited association with known users or sellers of illegal drugs. In re Pers. Restraint of Brettell, 6 Wn.App.2d 161, 169, 430 P.3d 677 (2018). In that case, the Court found that the condition, limited to prohibiting association with known “illegal” users was not impermissibly vague. Id. at 172. Division I discussed the unpublished decision in State v. Brown, No. 75458-1-I (Wash Ct. App. March 12, 2018),¹ noting that the indication of approval of a trial court’s rejection of a condition prohibiting

¹ Unpublished opinions have no precedential authority and may be cited to only a nonbinding authority to be given such persuasive value as the court deems appropriate. GR 14.1.

association with “known drug users” was dicta. Brettell, 6 Wn.App. 2d at 171.

In this case, the specific prohibition reads the defendant shall

. . . not use, possess, manufacture or deliver controlled substances without a valid prescription, not associate with those who use, sell, possess, or manufacture controlled substances and submit to random urinalysis at the direction of his/her CCO to monitor compliance with this condition.

CP 35. Like the condition in Vega, the condition in this case could be improved by adding the term “known.” However, the fact that the condition could be improved does not render it unconstitutionally vague.

As written, the term properly places an ordinary person on notice of the proscribed conduct and serves a legitimate purpose of limiting access to controlled substances and situations in which controlled substances might be used. Implicit in the placement of the condition after a prohibition of use without a valid prescription, places Green on notice that the restriction is intended to prohibit association with illicit users. However, as the State does not oppose remand in this case to correct a scrivener’s error, the State would not oppose amending the challenged portion of the condition

to “not associate with those known to illegally use, sell, possess, or manufacture controlled substances.”

2. The State has no objection to correcting a scrivener’s error.

Green assigns error to the listed maximum sentence for assault in the fourth degree as “1 year” in the judgment and sentence. CP 21. The State acknowledges that the maximum sentence for a gross misdemeanor is 364 days. RCW 9A.20.021(2). While listing the maximum sentence as one year does not affect the ultimate sentence imposed of 364 days with 274 suspended, the State does not oppose remand to amend the judgment and sentence to reflect the maximum sentence of 364 days.

3. The State does not oppose amending the interest provision for legal financial obligations to comply with RCW 10.82.090.

Effective June 7, 2018, “no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). The statute also now states “The court shall waive all interest on the portions of legal financial obligations that are not restitution that accrued prior to June 7, 2018.” RCW 10.82.090(2)(a). While the boilerplate language included in Green’s judgment and sentence

refers to the correct RCW, the language included reflects the law as it existed prior to June 7, 2018.

Given the current form of RCW 10.82.090, it is clear that Green is not required to pay interest on nonrestitution legal financial obligations. The Administrative Office of the Courts provided a modified form for a felony prison judgment and sentence that reflects the change in the law on its website in July of 2019.² To reflect the current state of the law, the language should read:

The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until paid in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

The State does not oppose remand for entry of an order substituting that language for the erroneously included language.

D. CONCLUSION.

The probationary condition that Green not associate with those who use, sell, possess, manufacture or deliver controlled substances is not unconstitutionally vague, however, the State does not oppose amending the condition to limit association with

² See, www.courts.wa.gov/forms/?fa=forms.contribute&formID=18, at form WPF CR 84.0400 P; 07/2019.

those known to illegally use, sell, possess, manufacture or deliver controlled substances. The State does not oppose correcting the noted maximum sentence for assault in the fourth degree and does not oppose correcting the boilerplate language in the judgment and sentence such that it complies with the current version of RCW 10.82.090. All other aspects of Green's convictions and sentence should be affirmed.

Respectfully submitted this 22nd day of October, 2019.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 22, 2019

Signature: Lynita Olsen

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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