

FILED  
Court of Appeals  
Division II  
State of Washington  
3/10/2020 12:34 PM

**NO. 53280-8-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**MICHAEL HUDSON,**

Appellant.

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

The Honorable Daniel L. Stahnke, Judge

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**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. The trial court improperly relied on aggravating sentencing factors to impose a lengthy exceptional indeterminate minimum sentence against Mr. Hudson.

2. The trial court erred in imposing a condition of community custody prohibiting Mr. Hudson from possessing alcohol.

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Statutory authority limits the basis on which a trial court can impose an exceptional sentence absent a jury finding aggravating factors. Here, after Mr. Hudson pled guilty, the trial court imposed an exceptional minimum sentence upward by relying on aggravating sentencing factors not authorized by statute. Is Mr. Hudson entitled to remand for resentencing?

2. Statutory authority limits the trial court's authority to impose certain conditions of community custody. Limitations on alcohol possession must be crime related. Did the trial court err in imposing a condition of community custody prohibiting Mr. Hudson from possessing alcohol when alcohol possession was not crime related?

### **C. STATEMENT OF THE CASE**

By its fourth amended information, the state charged Michael Hudson with 10 offenses: five counts of rape of a child in the first degree, four counts of sexual exploitation of a minor, and one count of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree. CP 2-5. All of the charges pertain to conduct with his biological children CJH and MSH. RP 18-19; CP 2-5. Counts 1-9 were charged as domestic violence. CP 2-5.

Early in the case, the state filed its notice of intent to seek an exceptional sentence upward if Mr. Hudson were to be convicted. CP 1. The state based its notice of intent to seek an exceptional sentence based on multiple counts giving Mr. Hudson a high offender score and that the high offender score meant some charged offenses would go unpunished. CP 1.

Mr. Hudson entered a guilty plea on all counts. CP 6-33; RP 7-21. The court ordered a pre-sentence investigation and set the matter over for sentencing. CP 34-55 (pre-sentence investigation report).

Counts 1-5 were subject to indeterminate sentences with a maximum term of life and a low end standard range of 240-318 months. CP 67.

The standard range sentences on counts 6-9 was 120-120 months.

CP 67. The standard range on count 10 was 87-116 months. CP 67.

At sentencing, after hearing from the parties, the court imposed exceptional minimum indeterminate sentences on counts 1-5 of 365 months each. CP 69; RP 62-64. On counts 6-9, the court imposed 120 months on each count. CP 69; RP 62-64. On count 10, the court imposed 116 months. CP 69; RP 62-64. The court ordered concurrent sentences on all the counts. CP 69.

The court entered written findings of fact and conclusions of law supporting its exceptional minimum sentences. CP 60-62.

The court also imposed lifetime community custody with certain conditions on counts 1-5. CP 70. One condition prohibits Hudson from possessing alcohol. CP 79.

Hudson appeals all portions of his sentence. CP 84.

#### **D. ARGUMENT**

**Issue 1: The trial court improperly relied on aggravating sentencing factors to impose exceptional minimum sentences on Counts 1-5.**

Statutory authority controls the authority under which a trial court can impose an exceptional sentence. RCW 9.94A.535(2).

To increase the low end standard range of an indeterminate sentence is to impose an exceptional sentence. *State v. Hughes*, 166 Wn.2d 675, 688, 212 P.3d 558 (2009).

RCW 9.94A.535(2) provides the court, sitting as a sentencing fact finder, with a finite list of aggravating sentencing factors it can use to impose an exceptional sentence upward.

In imposing the exceptional sentence, the court did not rely on the aggravating factors listed in RCW 9.94A.535(2) to increase Mr. Hudson's minimum indeterminate sentence. CP 60-62; RP 59-62. Instead, the first five aggravating factors in the court's findings of fact, 1.3(a)-(e), are found in RCW 9.94A.535(3). CP 61. Those factors require a jury determination before a judge can use them to impose an exceptional sentence.

As for the other three factors cited by the judge – factors 1.3(f)-(h) – in the court's findings of fact – they are not found anywhere in RCW 9.94A.535 and cannot be used to impose an exceptional sentence.

The remedy is remand for resentencing.

**Issue 2: The trial court erred in imposing an alcohol-related community custody condition unrelated to the charged crimes.**

The trial court imposed a condition of community custody prohibiting Mr. Hudson from possessing alcohol.<sup>1</sup> CP 79. Although Mr. Hudson did not object to the imposition of this condition, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

“As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (*citing State v. Autrey*, 136 Wn. App. 460,

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<sup>1</sup> The trial court also imposed a condition of community custody preventing Mr. Hudson from using alcohol. CP 79. Mr. Hudson does not dispute that prohibiting the use of alcohol as a condition of community custody is permitted by statute. *See* RCW 9.94A.703(3)(e) (authorizing the trial court, as a condition of community custody, to order an offender to not consume alcohol); *see also State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (holding that a trial court can order that a defendant sentenced to community custody not consume alcohol despite the lack of evidence that alcohol had contributed to his offense).

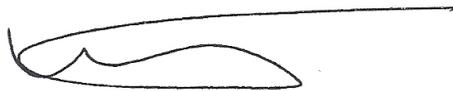
466-67, 150 P.3d 580 (2006)). A “[c]rime-related prohibition” is defined, in relevant part, as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10); *see also State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

There was no evidence in the record that alcohol was a factor in the crimes of conviction. Therefore, the condition of community custody prohibiting Mr. Hudson from possessing alcohol is not a “[c]rime-related prohibition[s].” RCW 9.94A.030(10); *see also O’Cain*, 144 Wn. App. at 775. Accordingly, this court should remand this case with an order to the trial court to strike the no possession of alcohol community custody condition. *See O’Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

#### **E. CONCLUSION**

Mr. Hudson is entitled to resentencing. As part of the resentencing, the trial court should strike the community custody condition that Mr. Hudson not possess alcohol.

Respectfully submitted March 10, 2020.

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LISA E. TABBUT/WSBA 21344  
Attorney for Michael Hudson

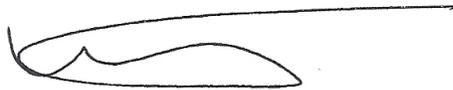
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Clark County Prosecutor's Office, at [cntypa.generaldelivery@clark.wa.gov](mailto:cntypa.generaldelivery@clark.wa.gov); (2) the Court of Appeals, Division II; and (3) I mailed it to Michael Hudson, DOC#411651, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

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

Signed March 10, 2020, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Michael Hudson, Appellant

**LAW OFFICE OF LISA E TABBUT**

**March 10, 2020 - 12:34 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53280-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Michael Hudson, Appellant  
**Superior Court Case Number:** 17-1-01732-9

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