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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SEIRAH DANIELS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was there a sufficient factual basis for Daniels's plea of guilty to Rape of Child in the Second Degree?
- B. Did Daniels receive effective assistance from her trial counsel during her sentencing proceedings?
- C. Did the trial court error when it imposed random urinalysis and breathalyzer tests as part of Daniels's community custody conditions?
- D. Did the trial court impermissibly impose a community custody condition requiring Daniels to consent to home visits from DOC, which include visual inspections of all areas of her residence, to monitor her compliance with supervision?

II. STATEMENT OF THE CASE

Daniels held down 12-year-old K.M.U. while Daniels's husband, Johnny Roach, raped K.M.U. CP 1-3, 13, 19-20. Daniels and Roach were charged as co-defendants with Rape of a Child in the Second Degree. CP 1-3. Daniels entered into a plea deal with the Prosecutor's Office. RP 3-4. Daniels was required to plead as charged, agree to cooperate with the prosecution of her husband in various ways, and if she complied with all the terms, the State would allow Daniels to withdraw her plea and enter a plea to Rape of Child in the Third Degree, which offered a significant reduction in prison time. *Id.*

Daniels pleaded guilty to Rape of a Child in the Second Degree. RP 2-8; CP 4-16. The Statement of Defendant on Plea of Guilty to Sex Offense stated,

In Lewis County Wa, between October 1, 2017 and December 31, 2017, my 18 year old husband engaged in sexual intercourse with KMU (dob 9-12-05). KMU was 12 years old and not married to or in a state registered domestic partnership with my husband (Johnny Roach). I aided, and encouraged this sex act.

CP 13.

Daniels breached her plea deal with the State and therefore did not get the benefit of the lesser charge and sentence. RP 18-25. Daniels's attorney acknowledged Daniels breached her plea deal, that she did not testify truthfully, "did everything she could to undermine" the State's case during cross-examination, and there was no explanation for Daniels's behavior during trial. RP 19-21. Daniels was ultimately sentenced within the standard range to 96 months to life in prison. RP 24; CP 29. The trial court incorporated all of the conditions DOC requested in Appendix H. RP 25; CP 31. Daniels timely appeals her conviction and sentence. CP 45-47.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THERE WAS A SUFFICIENT FACTUAL BASIS ESTABLISHED UPON THE TRIAL COURT'S ACCEPTANCE OF DANIELS'S PLEA OF GUILTY THAT DANIELS DID ACT AS AN ACCOMPLICE TO RAPE OF A CHILD IN THE SECOND DEGREE.

Daniels asserts there was an insufficient factual basis for her plea of guilty. Brief of Appellant 5-7. Daniels argues the facts submitted at her guilty plea did not satisfy the elements of accomplice liability, therefore her conviction must be vacated and the charge dismissed with prejudice. *Id.* Contrary to Daniels's assertion, there was a sufficient factual basis to establish she was an accomplice to Rape of a Child in the Second Degree and this Court should affirm Daniels's conviction.

1. Standard Of Review.

This Court reviews constitutional issues de novo. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015).

2. There Was A Sufficient Factual Basis For Daniels's Plea Of Guilty To Rape Of A Child In The Second Degree.

Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233

(2011) (citations omitted). The court rule requires a plea be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Prior to acceptance of a guilty plea, “[a] defendant must be informed of all the direct consequences of his plea.” *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted).

A plea cannot be considered voluntary if there is an insufficient factual basis for the plea. *In re Pers. Restraint of Evans*, 31 Wn. App. 330, 331, 641 P.2d 722 (1982), cert. denied, 459 U.S. 852 (1982). “The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.” CrR 4.2(d). A defendant must understand the criminal conduct alleged satisfies the elements of the crime charged. *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006). When the trial court makes its determination there is a factual basis for the guilty plea, it is not required to be convinced of the defendant’s guilty beyond a reasonable doubt. *State v. Saas*, 118 Wn.2d. 43, 820 P.2d 505 (1991) (citation omitted). When there is insufficient evidence to support the plea the proper remedy is to vacate the plea and dismiss the charges. *R.L.D.*, 132 Wn. App. at 706.

The elements of Rape of Child in the Second Degree are: a “person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.073(1). To satisfy accomplice liability, the State is required to prove the person who was an accomplice, “[w]ith knowledge that it will promote or facility the commission of the crime, [the person]: (i) [s]olicits, commands, encourages, or requests such other person to commit it; or (ii) [a]ids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). In Daniels’s matter, she was an accomplice in her husband’s rape of K.M.U. CP 1-3.

Daniels argues her plea did not sufficiently establish she knowingly promoted or facilitated the commission of the crime. Brief of Appellant 6-7. Daniels asserts the factual basis only establishes she aided and encouraged her husband’s crime. *Id.* That is a sufficient factual basis and Daniels’s claim fails.

Daniels’s plea statement reads: “My 18 year old husband engaged in sexual intercourse with KMU (dob 9-12-05). KMU was 12 years old and not married to or in a state registered partnership with my husband (Johnny Roach). I aided, and encouraged this sex act.”

CP 13. Daniels did not only aid Roach in raping 12 year old K.M.U., she encouraged it. While not using the statutory language, “with the knowledge it will promote or facilitate that crime,” Daniels statement establishes that she encouraged Roach to have sexual intercourse with KMU and she aided Roach to have sexual intercourse with KMU. This statement demonstrates Daniels had knowledge her actions promoted or facilitated the rape of K.M.U. This Court should find an adequate factual basis was established to support Daniels’s plea of guilty and affirm her conviction.

B. DANIELS RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY DURING HER SENTENCING PROCEEDINGS.

Daniels argues she received ineffective assistance from her counsel during her sentencing hearing because her attorney failed to recognize and point the trial court to the appropriate case law regarding sentence mitigation based upon Daniels’s status as a youthful offender. Brief of Appellant 7-13. The record does not support Daniels’s assertion and she received effective assistance from her counsel during her sentencing hearing.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and

extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Daniels's Attorney Was Not Ineffective During His Representation Of Daniels During The Sentencing Proceedings.

To prevail on an ineffective assistance of counsel claim Daniels must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The right to effective assistance of counsel extends throughout all proceedings including sentencing. *State v. Calhoun*, 163 Wn. App. 153, 168, 257 P.3d 693 (2011) (internal citations omitted). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no

conceivable legitimate tactic explaining counsel's performance.”
Reichenbach, 153 Wn.2d at 130.

If counsel’s performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice occurs if, but for “counsel’s deficient performance, there is a reasonable probability” the defendant’s “sentence would have been different.” *Calhoun*, 163 Wn. App. at 168.

Daniels argues her counsel failed to request a mitigated sentence based upon Daniels’s youth and therefore she received ineffective assistance of counsel during her sentencing hearing. Brief of Appellant 7-13. Daniels argues the trial court could not make an informed sentencing decision without being told it had the ability to impose a mitigated sentence below the standard range. *Id.* at 9. Daniels asserts the failure to consider the mitigated sentence qualifies as a fundamental defect resulting in a miscarriage of justice. *Id.* at 12, citing *State v. McFarland*, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017). Daniels further claims she was prejudiced by her attorney’s deficient performance because the trial court is required to consider the mitigated sentence, therefore there was “at least a possibility that the sentencing court would have considered’ imposing an

exceptional sentence downward in Ms. Daniels's case if her attorney had pointed that option out to the court." Brief of Appellant 12-13. Daniels argues facts not supported by the record and her argument thus fails.

Youthful age of an offender is not a per se mitigating factor, entitling a person to an exceptional sentence below the standard range. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017); *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). A trial court is required to consider a juvenile offender's youth as a possible mitigating factor, even if that juvenile has been adjudicated in adult court. *Houston-Sconiers*, 188 Wn.2d at 8-9, 20-21. Daniels is not a juvenile offender, therefore the trial court was not required to consider her youth as a mitigating factor.

One of the objectives of the Sentencing Reform Act (SRA) is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and offender's criminal history." RCW 9.94A.010(1). The structure provided by the SRA does not eliminate the discretion afforded to the trial courts when determining appropriate sentences. *State v. McFarland*, 189 Wn.2d 47, 52, 399 P.3d 1106 (2017), *citing* RCW 9.94A.010. A trial court is permitted to "impose a sentence outside the standard range

sentence for an offense if it finds, considering the purpose the SRA, that there are substantial and compelling reasons justifying an exceptional sentence.” *McFarland*, 189 Wn.2d at 52, *citing* RCW 9.94A.535 (internal brackets omitted).

Due to the advancements in the understanding of brain development, it is now widely accepted that adolescent’s emotional and cognitive development may impact and relate to the defendant’s crime. *O’Dell*, 183 Wn.2d 695-96. Therefore, a trial court is permitted to consider youth as a mitigating factor when imposing a sentence on a youthful offender. *Id.* at 686. A youthful offender includes offenders who are close in age to 18 years old when they committed their crime. *Id.* The State acknowledges Daniels is a youthful offender. Daniels was 18 to 19 years old when she assisted her husband in raping 12 year old K.M.U. CP 1-3, 13, 19-20. Simply being a youthful offender does not require a defendant’s trial attorney to argue youth as a mitigating factor for a sentence below the standard range.

A seasoned attorney understands how to employ a strategy calculated to optimize their client’s likelihood of receiving the best possible outcome. While Daniels’s counsel could have argued youth as a mitigating factor, he chose not to do so, and the record is silent

as to why. RP 19-23. The likely answer is after seeing Daniels testify during Roach's trial and breach her plea agreement with the State, trial counsel concluded his best argument was to request to trial court not give his client, Daniels, a sentence at the higher end of the sentencing range. This is precisely what Daniels's trial counsel did. RP 19-23. There was no way for trial counsel to get around Daniels's untruthful testimony during her husband's trial and her culpability in the crime. Trial counsel's performance was not deficient, and therefore not ineffective assistance of counsel.

If this court were to find Daniels's counsel's performance deficient, Daniels was not prejudiced. A trial court is required to consider an exceptional sentence below the standard range when a party requests. *McFarland*, 189 Wn.2d at 56. To show prejudice Daniels must show that there is a reasonable probability the request for a mitigated sentence would be granted if her attorney had argued for a sentence below the standard range. *Calhoun*, 163 Wn. App. at 168. Daniels fails, the trial court would not have granted a mitigated sentence below the standard range.

The State requested a sentence on the higher end of the sentencing range, 114 months. RP 18. The State noted it would not be unreasonable for it to request high end of the range (125 months).

RP 18-19. Yet, the State was asking for the same sentence as it recommended in Mr. Roach's case. RP 18. The State noted the statements from the victim and her mother, which discussed Daniels's participation in the crime. RP 19. The State continued, stating Daniels "obviously breached her plea agreement with the state and initially took responsibility on the stand in the trial and then later backed out and said it never happened." RP 19.

The trial court when it delivered Daniels's sentence did not only sentence Daniels to eight years because it had a certain ring to it, as Daniels asserts. Brief of Appellant 13; RP 24. The trial court stated,

I'm going to impose a sentence of 96 months. It's almost the bottom of the range. And I think that compared to what Mr. Roach did, looking at Ms. Daniels' role in this, it is lesser in my mind. I don't think it's bottom of the range, but I think eight years has a certain ring to it. I think eight years will allow her the time, as Ms. Usselman put it so well, to find herself and to find her strength. She certainly doesn't have that now.

What I saw on the stand to this day mystifies me. I don't know what her intent was. I honestly don't. I don't know if she was trying to help the state or if she was trying to help Mr. Roach. It's clear to me that she breached her plea agreement, and this is a consequence of receiving that plea agreement. Again, I don't know what her intent was. I don't know if she had the ability to follow through and hold up in the face of cross examination, but it's clear to me that she

breached her plea agreement, and this is the result of breaching that plea agreement.

RP 24.

It is clear from the trial court's statements even if Daniels had argued her youth, which was known to the court, as a mitigating factor, the trial court would not have found substantial and compelling reasons justifying an exceptional sentence to give Daniels a mitigated sentence below the standard range. RCW 9.94A.535. Daniels was not prejudiced by her attorney's alleged deficient performance. This Court should find Daniels's trial attorney provided effective assistance of counsel during Daniels's sentencing hearing and affirm Daniels's sentence.

C. THE REQUIREMENT FOR RANDOM URINALYSIS AND BREATHALYZERS ARE PERMISSIBLE COMMUNITY CUSTODY CONDITIONS.

Daniels argues the imposition of two of her community custody conditions are not permissible because they are not crime-related prohibitions. Brief of Appellant 13-16. Both of the requirements are permissible forms of testing to ensure compliance with lawful statutory community custody conditions.

There are mandatory, waivable, discretionary, and special conditions of community custody. RCW 9.94A.703. A waivable condition shall be ordered unless waived by the court. RCW

9.94A.703(2). Refraining “from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions” is a waivable community custody condition. RCW 9.94A.703(2)(c). A discretionary condition is a condition the court may order as part of a defendant’s community custody. RCW 9.94A.703(3). Refraining “from possessing or consuming alcohol” is a discretionary condition of community custody. RCW 9.94A.703(3)(e). Courts are permitted to require testing to determine whether the defendant is meeting other statutorily authorized community custody conditions. *State v. Acevedo*, 159 Wn. App. 221, 234, 248 P.3d 526 (2010).

The trial court did not waive Daniels’s requirement to refrain from possession or consuming controlled substances except pursuant to a lawfully issued prescription. CP 39 (Appendix H, (a)(3) and (b)(6)). The trial court also exercised its discretion to impose the discretionary community custody condition to refrain from consuming alcohol. CP 39 (Appendix H, (b)(6)). The trial court is allowed to impose a requirement for testing to ensure compliance with the conditions of community custody. Therefore, the requirement for random breathalyzers and urinalysis testing are valid conditions of Daniels’s community custody and should not be stricken from the judgement and sentence.

D. THE STATE CONCEDES THE COMMUNITY CUSTODY CONDITION REQUIRING DANIELS TO CONSENT TO HOME VISITS THAT REQUIRE HER TO ALLOW FOR VISUAL INSPECTIONS OF HER RESIDENCE MUST BE STRICKEN BECAUSE IT REQUIRES DANIELS'S TO SUBMIT TO A SEARCH OF HER RESIDENCE ABSENT REASONABLE SUSPICION SHE COMMITTED A PROBATION VIOLATION.

Daniels argues her community custody conditions that requires her to consent to allow home visits from her community corrections officer that allow the CCO to perform visual inspections of her residence to monitor her compliance should be stricken because it requires Daniels to submit to random suspicionless probationary searches. Brief of Appellant 16-20. Daniels further argues this issue is ripe for review. *Id.* at 18-20. Daniels is correct. The State concedes the conditions requires Daniels to be subject to a probationary search absent a reasonable suspicion she has committed a probation violation, let alone a nexus to the place being searched to a probation violation. This condition is not lawful and must be stricken.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-

35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989).

A probationer has a lessened expectation of privacy in his or her person, home and property. *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981); *State v. Jardinez*, 184 Wn. App. 518, 523, 338 P.3d 292, 294 (2014). The lessened expectation of privacy does not give a CCO carte blanche to search a probationer's residence. *In re Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009). A CCO must have a reasonable suspicion that the probationer has committed a probation violation. RCW 9.94A.631; *Winterstein*, 167 Wn.2d at 628-29. This requirement is codified in the RCW,

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1). "Analogous to the requirements of a *Terry* stop, reasonable suspicion requires specific and articulable facts and

rational inferences.” *Jardinez*, 184 Wn. App. at 524, *citing State v. Parris*, 163 Wn. App. 110, 119, 259 P.3d 331 (2011)(referring to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)). “[A]rticle I, section 7 permits a warrantless search of property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation.” *State v. Cornwell*, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018). The Washington Supreme Court in *Cornwell* also noted there was no compelling argument in support of requiring open ended searches of a probationers property as the probation system did not legitimately demand such searches. *Cornwell*, 190 Wn.2d at 305.

Daniels’s Appendix H has the following condition, “The defendant must consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.” CP 40 (Other Conditions, (10)). This condition violates the Daniels’s article I, section 7 right to be free of warrantless searches, even under the lessened expectation of privacy of a probationer, as it allows for open ended searches without any allegation of a violation of a condition of her conditions of community custody. The State concedes this

condition should be stricken from the judgment and sentence. The State further concedes this issue is ripe as it will immediately restrict Daniels upon her release from prison and is purely a legal question. *State v. Bahl*, 164 Wn.2d 739, 751-52, 193 P.3d 679 (2008).

IV. CONCLUSION

There was a sufficient factual basis for Daniels's plea of guilty to Rape of a Child in the Second Degree. Daniels received effective assistance from her counsel during her sentencing proceedings. The trial court's imposition of community custody conditions requiring random urinalysis and breathalyzer testing is lawful. The State concedes the community custody condition requiring Daniels to consent to home visits that allow for visual inspections of her residence without requiring a nexus between the searched property and a probation violation is overly broad and must be stricken.

This Court should affirm Daniels's conviction and sentence with the exception of the home visit community custody provision, which this Court must remand to be stricken from the judgment and sentence.

RESPECTFULLY submitted this 22nd day of July, 2020.

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A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

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