

No. 28794-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
SEP 13 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SAMUEL EMANUEL ALSTON,

Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
HONORABLE JOHN W. LOHRMANN

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on the elements required to convict Alston of second degree theft because it did not require the jury to find that the theft involved property consisting only of “cash, belonging to Matthew Mahan” as specified in the Information.

2. Alston was denied his right to notice of all essential elements of the crime with which he was charged, as protected by the Sixth Amendment and Washington Constitution, art. I, § 22.

3. The evidence was insufficient to establish all elements of the crime of second degree theft as charged.

4. The offender score is incorrect where the current offenses appear to constitute the same criminal conduct.

5. The trial court erred in imposing certain conditions of sentence.

Issues Pertaining to Assignments of Error

1. Where the prosecution presented evidence Alston obtained or exerted control of property not included in the Information, did the court deny Alston the right to notice of the elements of the crime with which he was charged and the opportunity to prepare a defense?

2. Had the jury been properly instructed based on the Information, was the evidence insufficient to sustain the conviction of second degree theft?

3. Do the current convictions constitute the same criminal conduct?

4. Does a sentencing court exceed its statutory authority by imposing certain conditions of community custody that are not crime-related?

5. Does a trial court's delegation to a community corrections officer of the authority to determine without a hearing whether a treatment counseling program is necessary and crime-related violate due process and constitute an excessive delegation of judicial authority?

B. STATEMENT OF THE CASE

The defendant, Samuel Emanuel Alston, was charged with second degree identity theft alleging unauthorized use of a means of identification of Matthew Mahan and with second degree theft of "property or services of another of a value exceeding two hundred fifty dollars (\$250.00) but less than one thousand five hundred dollars (\$1,500.00) ... to-wit: Cash, belonging to Matthew Mahan". CP 4-5.

At trial, Matthew Mahan testified he was part-owner of his family's business, Herring Funeral Home, located in Walla Walla Washington. RP 25–26. The funeral home provided Mahan with a VISA credit card for business use, issued by Baker Boyer Bank. RP 26. At some point Mahan became aware of three unauthorized charges made to the business credit card, which reflected payment to a T-Mobile phone account (\$350) and a Comcast Cable account (\$535.36), and a Western Union wire money transfer of \$175. CP 26–27, 29–30, 43–45.

There was evidence that the two accounts were set up by Alston and involved his social security number and date of birth and addresses reported by Alston to Department of Corrections while under supervision, that the payee on the wire transfer was his cousin, and that at least two of the transactions used an e-mail internet provider address registered to Alston. RP 41–44, 46, 48, 64–66, 76, 78–80.

In pertinent part, the jury was instructed:

Instruction 10 A person commits the crime of Theft in the Second Degree when he or she commits theft of property or services exceeding \$250 in value, but not exceeding \$1500 in value”.

CP 29.

Instruction 14: To convict the defendant of the crime of Count 2, Theft in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between the 2nd day of January, 2007, and the 3rd day of January, 2007, the defendant wrongfully obtained or exerted unauthorized control over property of another;
- (2) That the property exceeded \$250 in value;
- (3) That the defendant intended to deprive another of the property; and
- (4) That the acts occurred in the State of Washington.

CP 33.

The jury found Alston guilty as charged of second degree identity theft and second degree theft. CP 40. Based on an offender score of 9, the sentencing court imposed concurrent high end standard range sentences of 55 months and 29 months on the second degree identity theft and second degree theft convictions, respectively. CP 49, 53. The court also imposed a term of 12 months community custody, with specified conditions. CP 53–55. This appeal followed. CP 66.

C. ARGUMENT

1. Alston was denied his right to fair notice of the charges and an opportunity to defend where the "to convict" instruction for second degree theft given by the court allowed the jury to convict him of a crime not charged in the information.¹

An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); *see also* U.S. Const. amend. 6; WA Const. art. I, § 22. An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (citing State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

In State v. Brown, the information alleged that defendant Christiansen conspired with 11 identified people to commit theft. 45 Wn. App. at 573-74. The information did not allege that Christiansen had

¹ Assignments of Error 1, 2 and 3.

conspired with any unnamed co-conspirators. *Id.* The "to convict" instruction, however, allowed the jury to find Christiansen guilty if he agreed with "one or more persons" to engage in the conduct at issue. *Id.* at 574 n. 2. Because several witnesses not named in the information testified at trial about their involvement in the conspiracy, thereby allowing the jury to return a guilty verdict by finding Christiansen conspired with one of the uncharged witnesses, the instruction was both erroneous and not harmless beyond a reasonable doubt. *Id.* at 576 (citing *State v. Valladares*, 99 Wn.2d 663, 671, 664 P.2d 508 (1983)).

Here, the information charged Alston in pertinent part as follows:

Count 2, Theft in the Second Degree... committed as follows:
That the said Samuel Emanuel Alston, in the County of Walla Walla, State of Washington, between the second day of January, 2007 and the third day of January, 2007, did wrongfully obtain or exert unauthorized control over the property or services of another, of a value exceeding \$250, but less than \$1,500, with intent to deprive him or her of such property or services, *to-wit: Cash, belonging to Matthew Mahan.*

CP 4–5 (emphasis added).

During trial, the trial court admitted evidence involving property other than the "cash belonging to Matthew Mahan" described in the information. Specifically, the State presented evidence of an employer-provided VISA credit card not identified in the information, bearing the names of the employer and Matthew J. Mahan and issued by Baker Boyer

Bank. The State also presented evidence that three unauthorized charges were made to the business credit card by computer transfer, also not identified in the information. Transfers were made to a T-Mobile phone account (\$350) and a Comcast Cable account (\$535.36), and a Western Union wire transfer of \$175 was sent to a location in Tacoma WA. CP 26–27, 29–30, 43–45. The three transfers involved a business credit card account, not “cash belonging to Matthew Mahan” as charged in the information.

The court's instructions to the jury, in contrast to the information, did not require the State to prove or the jury to find that Alston's second degree theft involved any “cash belonging to Matthew Mahen”. Instead, the following pertinent instructions were given.

The jurors were instructed that “[a] person commits the crime of Theft in the Second Degree when he or she commits theft of property or services exceeding \$250 in value, but not exceeding \$1500 in value”.

Instruction 10 at CP 29.

Instruction 14 provided in relevant part:

To convict the defendant of the crime of Count 2, Theft in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (5) That between the 2nd day of January, 2007, and the 3rd day of January, 2007, the defendant wrongfully

- obtained or exerted unauthorized control over property of another;
- (6) That the property exceeded \$250 in value;
 - (7) That the defendant intended to deprive another of the property; and
 - (8) That the acts occurred in the State of Washington.

Instruction 14 at CP33; RP 103.

As in Brown, the jury in this case could have returned a guilty verdict by finding that Alston committed acts not charged in the information, specifically acts relating to transfers made on a business credit card account rather than involving “cash belonging to Matthew Mahen”. Alston’s right to notice and a fair opportunity to present a defense was violated. The conviction for second degree theft must be reversed.

The error was not harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425. The three unauthorized transactions here did not involve “cash belonging to Matthew Mahen”, but instead were unauthorized charges against a business account owned by Mr. Mahen’s employer. While the computer transfers to the T-mobile and Comcast Cable accounts clearly did not involve cash, it is possible the wire transfer of \$175 as a money order through Western Union could be seen as

involving actual money. However, a jury could not reasonably have found that a \$175 money order “exceeded \$250 in value” as required by the “to convict” instruction for second degree theft. The evidence was therefore insufficient to prove all elements of that crime. The conviction for second degree theft must be reversed and the matter remanded for resentencing based on a conviction of third degree theft.

2. The two current offenses appear to encompass the same criminal conduct.²

“A sentencing court must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. RCW 9.94A.525(5)(a)(i). The court has no discretion on this. State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995); State v. Lara, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992).” State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 74 (2008) (emphasis in original).

"Same criminal conduct" is indicated when two or more crimes that require the same criminal intent are committed at the same time and place and involve the same victim. RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct."

² Assignment of Error 4.

State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The fact that crimes have different elements is not the correct test for determining “same criminal conduct”. See Id. at 410.

The Legislature intended that courts construe the phrase, "same criminal conduct," narrowly. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). To determine if two crimes share a criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts should also consider whether one crime furthered the other. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Standard of Review. Appellate courts review a trial court's finding that the offenses did not constitute the same criminal conduct for abuse of discretion. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). A sentencing court abuses its discretion by not exercising discretion. Lara, 66 Wn. App. at 931-32.

Here, the Judgment and Sentence contains the following relevant provisions:

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589(1)): (*left blank*)

Other current convictions used in calculating the offender score are (List offense and cause number): (*handwritten in*)
Count 2: Theft second degree

CP 49 at ¶ 2.1 (*italicized comments added*). There is no discussion in the record whether the court considered the issue of “same criminal conduct”. The two offenses apparently occurred at the same time and place and involve the same victim, and the same criminal intent was shared where the identity theft facilitated the theft of property. Thus, it appears that the two current convictions could be labeled “the same criminal conduct” and count for fewer points in the offender score. Because this Court cannot determine from the record whether the trial court exercised its discretion or did so properly, the matter should be remanded for consideration by the sentencing court on the record.

3. A sentencing court violates due process and exceeds its statutory authority by imposing certain conditions of community custody that are not crime-related and delegating to a community corrections officer the authority to determine without a hearing whether a treatment counseling program is necessary and crime-related.³

Herein, as conditions of sentence, the court imposed the following offending conditions:

The defendant shall participate in crime-related treatment or counseling services as follows:

inpatient or outpatient alcohol/drug program at his/her expense, at the discretion of his/her probation/community corrections officer. [T]he duration of treatment is to be at the discretion of his/her probation/community corrections officer.

CP 54 at ¶ 4.2(b)(ix).

That defendant will participate in an outpatient alcohol/drug program at his expense, at the discretion of his probation officer. That the duration of treatment is to be at the discretion of his probation officer.

CP 58 at ¶ 11.

The defendant shall not *possess or* consume alcohol.

CP 54 at ¶ 4.2(b)(x) (italicized language is handwritten in).

³ Assignment of Error 5.

These conditions are unrelated to the crimes of which Alston was convicted, and the two conditions regarding alcohol/drug treatment further violate due process and are an improper delegation of the court's authority.

A trial court's sentencing authority is limited to that granted by statute. State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996), citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024 (1993). If a trial court exceeds that authority, its order may be corrected at any time. Paine, 69 Wn. App. at 883. Conditions of community custody not directly related to the circumstances of the crime are not authorized by statute. A trial court lacks authority to impose such conditions. *See* State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); In re Carle, 93 Wn.2d 31, 33, 604 P.2d (1980). Sentencing conditions are reviewed for abuse of discretion. *See* State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Conditions are not crime-related. The Legislature has authorized the imposition of prohibitions and affirmative conduct upon a defendant, provided they are related to the circumstances of the crime. RCW 9.94A.030(11), RCW 9.94A.505(8). Under the sentencing statute in effect

in this case, community custody is governed by former RCW 9.94A.710⁴ or former RCW 9.94A.715⁵. Former RCW 9.94A.505(2)(a)(iii). RCW 9.94A.710 (2008) relates to community custody for sex offenders and thus is not applicable here. RCW 9.94A.715 (2008) provides for conditions of community custody as follows:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). *The conditions may also include those provided for in RCW 9.94A.700(5).* The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

Former RCW 9.94A.715(2)(a) (emphasis added).

Alston first challenges the conditions imposed pursuant to former RCW 9.94A.700(5)(c)⁶ that he attend and participate in an inpatient or outpatient alcohol/drug program, if ordered to do so by the supervising

⁴ RCW 9.94A.710 was recodified as RCW 9.94B.070 by Laws 2008 c 231, § 56, effective August 1, 2009.

⁵ RCW 9.94A.715 was repealed by Laws 2008 c 231, § 57 and Laws 2009 c 28, § 42, eff. August 1 2009.

⁶ Former RCW 9.94A.700(5) provides:

“(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

Community Corrections Officer. CP 54 at ¶4.2(b)(ix); CP 58 at ¶ 11.

Here, there was no evidence that alcohol or drugs were involved in the commission of the crime. This condition is unrelated to the crimes of which Alston was convicted, and must be stricken on that basis.

Alston also challenges the condition that he not *possess* alcohol. Former RCW 9.94A.700(5)(d) allowed the trial court to prohibit only the consumption of alcohol, not its possession. The trial court had authority to prohibit Alston from consuming alcohol regardless of whether alcohol was related to the crime. *See 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). However, because there is no evidence that alcohol played a role in these crimes, the trial court could not go beyond the statutory authority, which allows only prohibition of the consumption of alcohol. The requirement that Alston not possess alcohol was improperly imposed and should be stricken.

Improper delegation. Further, the Court's delegation of authority to DOC to determine what is "crime-related" is not authorized by statute. The imposition of crime-related prohibitions must be made by the Court,

(d) The offender shall not consume alcohol; or
(e) The offender shall comply with any crime-related prohibitions."

not DOC. *See* RCW 9.94A.030(10)⁷. Sentencing courts do have the power to delegate some aspects of community placement to probation. State v. Sansone, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).⁸ However, sentencing courts may not delegate excessively. Id. at 642. A sentencing court “may not wholly ‘abdicate [] its judicial responsibility’ for setting the conditions of release.” Sansone, 127 Wn. App. at 643, quoting United States v. Loy, 237 F.3d 251, 266 (3rd Cir. 2001) (quoting United States v. Mohammad, 53 F.3d 1526, 1438 (7th Cir. 1995)).

The precise delineation of the terms of probation is a core judicial function. State v. Williams, 97 Wn. App. 257, 264, 983 P.2d 687 (1999). The task cannot be delegated to a probation officer, treatment provider, or other agency. Williams, 97 Wn. App. at 264. The Court’s analysis in Williams is instructive.

Williams pled guilty to a number of misdemeanors. The district court sentenced him to probation. The sentencing order stated: “The

⁷ “(13) ‘Crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.” RCW 9.94A.030(10).

⁸ While it is the function of the judiciary to determine guilt and impose sentences, “the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in nature and are properly exercised by an administrative body, according to the manner prescribed by the

Probation Department is responsible for setting specific conditions of probation. The Defendant may request a hearing to review these conditions.” Williams, 97 Wn. App. at 260.

Upon entering probation, Williams received a form that ordered him not to use alcohol or unlawful drugs, and to submit to alcohol and drug testing upon request. These conditions had not been mentioned in the original sentencing order, and Williams’ use of alcohol or drugs did not play a role in the crimes to which he pled guilty. When Williams subsequently violated the alcohol and drug conditions, the probation department recommended an alcohol evaluation. The probation officer obtained the court’s approval for the new conditions informally, without a hearing, by having the commissioner initial the phrase “OK” on a form. Williams, 97 Wn. App. at 261. Williams did not adhere to the new conditions, either, and eventually the court revoked his probation. Id.

On appeal, Williams argued the drug and alcohol conditions were imposed without a hearing and therefore violated his due process rights. Because Williams was informed he had a right to a hearing to review the conditions, however, due process was satisfied.

Legislature.” Sansone, 127 Wn. App. at 642 (*quoting State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937)).

The original sentencing order advised Williams of his right to a hearing to review the specific conditions of probation that were to be set by the Probation Department. The agreement he signed in July, 1996, also notified him of his right to request a hearing at any time to review its terms. Williams does not contend that the order to undergo alcohol treatment was unclear. He could have objected to the alcohol-related conditions at any one of the several hearings the commissioner held before imposing jail time as a sanction for probation violations. Williams received notice and an opportunity for a hearing sufficient to satisfy due process.

Williams, 97 Wn. App. at 264 (citation omitted).

Williams also argued that allowing the Probation Department to establish the specific conditions of his probation was an unlawful delegation of judicial authority. Williams, 97 Wn. App. at 264. The Court agreed that setting the terms of probation is a “core judicial function.” Id. Nevertheless, the Court concluded that so long as the sentencing court “ratifies the terms recommended by the probation officer or treatment agency and adopts them as its own,” there is not unlawful delegation as a matter of fact. Williams, 97 Wn. App. at 265. Accordingly, the Court concluded that the district court in Williams had not unlawfully delegated its authority, although the Court did not necessarily condone the informal procedure used to ratify the probation conditions. Id.; *see also* State v. Wilkerson, 107 Wn. App. 748, 755, 31 P.3d 1194 (2001).

The application of rehabilitative programs ordered by a court is an administrative function properly exercised by an administrative body.

Sansone, 127 Wn. App. at 642. The problem with the condition challenged herein is that it allows the community corrections officer [hereafter “CCO”] not only to oversee the application of any treatment counseling programs ordered by the court, but to pick them as well. This is a core judicial function that cannot be delegated. And unlike in Williams, there is no indication herein of a procedure in place whereby the court ratifies and adopts as its own the condition imposed by the CCO.

Furthermore, Alston has not been given the right, as was Williams, to contest CCO-imposed conditions at a hearing. Accordingly, the condition violates due process as well. Although Alston has not been charged with violating the condition, he should not have to wait until that potentiality to challenge it. *See, e.g., State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (where a sentence is insufficiently specific about the period of community placement or community custody, remand for amendment of the judgment and sentence to expressly provide for the correct period is the proper course).

For all the above reasons, this Court should strike the offending conditions.

D. CONCLUSION

For the reasons stated, the second degree theft conviction should be reversed and the matter remanded for re-sentencing to third-degree theft and removal of the offending sentencing conditions, and with instructions to consider on the record whether the convictions are same criminal conduct.

Respectfully submitted on September 13, 2010.


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