

No. 28884-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

EDDIE CORTEZ,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
HONORABLE JOHN D. KNODELL

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the conviction of possession of a controlled substance other than marijuana—hydrocodone.

2. The trial court erred in concluding “The respondent is guilty beyond a reasonable doubt of possession of a controlled substance other than marijuana.” CP 28, ¶ 3.5.

3. The disposition court exceeded its authority in imposing invalid conditions of community supervision.

4. The disposition court erred in ordering conditions F, J and M of community supervision. (CP 16)

5. Condition H of community supervision allows probation to set the terms of Eddie’s supervision without notice or a hearing and therefore violates due process.

6. Imposition of Condition H of community supervision constitutes an excessive delegation of judicial authority to the probation officer.

Issues Pertaining to Assignments of Error

1. Was the evidence insufficient to support the conviction of possession of a controlled substance—hydrocodone?

2. Did the trial court exceed its statutory authority in imposing conditions of community supervision that were neither tailored to meet appellant's specific needs nor related to his underlying offense?

3. Where the condition challenged herein allows probation to establish the specific conditions of community supervision without a hearing, does the condition violate due process and constitute an excessive delegation of judicial authority?

B. STATEMENT OF THE CASE

On a school day morning, Eddie Cortez and a fellow student entered and sat in a car in the parking lot of Moses Lake High School, Grant County Washington. After subsequent events, Eddie was convicted of fourth degree assault against a school security officer and resisting arrest by Moses Lake Police Officer Ray Lopez. RP 10–21, 29–31, 34–39, 53, 58, 67–69, 72–80, 102–21, 129–31, 139–40, 360–61; CP 12.

Following arrest, the car was impounded as evidence based on the presence of a green leafy material later determined to be marijuana in open sight in the center console and the smell of marijuana coming from the car and from the person of the fellow student as he got out of the car. RP 31–32, 39, 43, 49, 61–62, 80–83. During execution of the search warrant, a prescription pill bottle with the name “Jaime Hampshire” and the word

“hydrocodone” on its label was found in the driver’s side door compartment located underneath the arm rest. RP 83, 85, 87–88, 133, 135, 171–72, 174–78. The content of the bottle was later identified as containing hydrocodone. RP 205.

The car is registered to Fidel Cortez Herrera. RP 83. Eddie had been seen driving the car before, and during this incident started the car. RP 14, 16–17, 44, 255. A Washington Department of Licensing letter addressed to Eddie, a Washington DOL traffic safety education certificate, a district court adjudication slip, a class schedule, and an algebra textbook with Eddie’s name inside were found inside the car. RP 89, 183–8, 191–93.

Following the bench trial, Eddie was also convicted of possession of marijuana and possession of a controlled substance other than marijuana—hydrocodone. RP 363–64; CP 12. As part of the disposition, the trial court imposed certain conditions of community supervision. CP 16.

This appeal followed. CP 22. On the Court’s motion, the matter has been put on an accelerated briefing schedule. *See* RAP 18.12; Court’s perfection letter dated April 6, 2010, on file.

C. ARGUMENT

1. Eddie was denied due process of law when he was found guilty of possessing hydrocodone based solely on its presence in his car.¹

Standard of proof. As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Evidence is sufficient to support an adjudication of guilt in a juvenile proceeding if any rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); State v. Naranjo, 83 Wn. App. 300, 303, 921 P.2d 588 (1996); State v. Fager, 73 Wn. App. 617, 619, 870 P.2d 336 (1994). At the adjudication hearing, the court is required to state its findings including the evidence relied upon and enter its decision, JuCR 7.11(c), and to reduce them to writing if the case is appealed, JuCR 7.11(d). This court then reviews its findings to determine

¹ Assignments of Error 1 and 2.

whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993).

Constructive possession. Possession may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Here, the state did not argue that Eddie had actual possession of the hydrocodone. Rather, the state showed proximity to the contraband, which is insufficient to prove constructive possession. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Constructive possession requires a showing that the defendant had dominion and control over the contraband or over the premises where the contraband was found. Echeverria, 85 Wn. App. at 783; State v. Cantabrana, 83 Wn. App. 204, 206, 921 P.2d 572 (1996). An automobile is deemed “premises” for purposes of this rule. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971); State v. Huff, 64 Wn. App. 641, 654, 826 P.2d 698 (1992). In establishing dominion and control, the totality of the circumstances must be considered and no single factor is dispositive. State v. Alvarez, 105 Wn. App. 215, 221, 19 P.3d 485 (2001); State v. Bradford, 60 Wn. App. 857, 862–63, 808 P.2d 174 (1991). There must be

substantial evidence showing dominion and control. Callahan, 77 Wn.2d at 29; State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731, *rev. denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995).

The ability to reduce an object to actual possession is but one aspect of dominion and control. Echeverria, 85 Wn. App. at 783. The mere fact of a person's physical nearness or "proximity" to certain goods or an article of goods is not enough, standing alone, to prove dominion and control over the goods and therefore constructive possession of them. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Although exclusive control is not necessary to establish constructive possession, a showing of more than mere proximity to the item is required. State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). The fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the item without more is insufficient to show the dominion and control necessary to establish constructive possession. Id. It is not a crime to have dominion and control over the premises where drugs are found. Rather, dominion and control is but one factor to consider in deciding whether the defendant exercised dominion and control over the drugs in questions. Cantabrana, 83 Wn. App. at 207–08; State v. Shumaker, 142 Wn. App. 330, 333–35, 174 P.3d 1214 (2007).

Here, there is no real dispute that Eddie had dominion and control over the car itself – documents and a textbook bearing his name were found in the car, and Eddie had a key to start the car. The issue is whether there are sufficient other factors to support a finding that Eddie also had dominion and control over the prescription bottle found inside a door compartment.

Eddie's case is distinguishable from cases in which being the driver or holding the keys to the car was sufficient in itself to affirm a conviction for possession. In Potts, the Court found that the defendant's having keys to the car, driving it and being the sole occupant was sufficient to support the trial court's finding that the defendant was in dominion and control over the marijuana plant in the trunk and marijuana in a tin box in the glove compartment. State v. Potts, 1 Wn. App. 614, 615, 617, 464 P.2d 742 (1969). In Dodd, the Court found that the defendant's driving the car and being its sole occupant, together with statements that he knew that the drugs were in the car and had used them, was sufficient to find the defendant had dominion and control over pentobarbital tablets discovered in the console compartment of the car. State v. Dodd, 8 Wn. App. 269, 271, 274–75, 505 P.2d 830 (1973).

Here, unlike in Potts and Dodd, Eddie was not the sole occupant of the car. There was no evidence that he knew the prescription bottle was in the car or that he had used the drug, or even that he had touched the bottle. *See State v. Callahan*, 77 Wn.2d at 31–32, 459 P.2d 400 (1969) (handling of drugs earlier in day, together with being in close proximity to other drugs and admitted ownership of guns, book on narcotics and measuring scales, was insufficient to support a finding of constructive possession) and *State v. Spruell*, 57 Wn. App. 383, 384–85, 387–89, 788 P.2d 21 (1990) (fingerprint on plate containing cocaine that had been thrown to the floor as police arrived was insufficient to support a finding of constructive possession).

Furthermore, the prescription label was apparently in the name of a “Jaime Hirshfield” and there was no evidence that Eddie knew such a person. The security officer testified only that the two occupants appeared to duck their heads below the dashboard, and made no mention of any movements by Eddie to perhaps secrete something in the door compartment. RP 15, 46–47. There was no evidence that Eddie was under the influence of any drug. Other than his being a driver of the car with a friend along as passenger, there was no evidence that Eddie had dominion and control over the bottle of hydrocodone.

The state's entire argument was that Eddie should be viewed as constructively possessing the bottle because he was in close proximity to it. RP 272, 337. In Echeverria, the Court reversed a conviction against a juvenile driver for unlawfully possession a "throwing star". The throwing star was found underneath the driver's seat, not in plain view. The Court explained the reversal as being based on the fact that "[c]lose proximity alone is not enough. Echeverria, 85 Wn. App. at 784. Here, the prescription bottle was located in a driver's door compartment underneath the arm rest. As in Echeverria, the hydrocodone was not in plain view. Thus, Eddie's proximity to the bottle, without more, was insufficient to establish that he had dominion and control over the drug.

A review of the applicable rules of constructive possession and Washington cases with comparable facts shows that the trial court's verdict of guilty was not supported by constitutionally sufficient evidence. As a consequence, the verdict must be reversed and the charge against Eddie dismissed with prejudice. Hudson v. Louisiana, 450 U.S. 40, 1010 S.Ct. 970, 67 L.Ed.2d 30 (1981); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. The disposition court exceeded its authority by imposing invalid conditions of community supervision and improperly delegated its authority to the probation officer to fashion the appropriate rehabilitative programs for Eddie while on community supervision.²

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.

When sentencing a juvenile to local sanctions under RCW 13.40.0357, the court has authority to impose 0 to 12 months of community supervision on each count. RCW 13.40.020(4). "Community supervision" means an "order of disposition by the court of an adjudicated youth not committed to the department or an order granting a deferred disposition". RCW 13.40.020(4). It is an "individualized program" which may include community-based sanctions; community-based rehabilitation; monitoring and reporting requirements; and/or posting of a probation bond. RCW 13.40.020(4)(a)-(d).

² Assignments of Error 3, 4, 5 and 6.

“Community-based rehabilitation” means one or more of the following:

Employment; attendance of information classes; literacy classes; counseling, outpatient substance abuse treatment programs, outpatient mental health programs, anger management classes, education or outpatient treatment programs to prevent animal cruelty, or other services; or attendance at school or other educational programs appropriate for the juvenile as determined by the school district.

RCW 13.40.020(1).

Although the juvenile court has discretion to tailor the disposition to meet the needs of the juvenile and the rehabilitative and accountability goals of the juvenile code,³ the community supervision should be individualized and therefore tailored to meet the juvenile’s specific needs. State v. H.E.J., 102 Wn. App. 84, 87, 9 P.3d 835 (2000). The H.E.J. court suggests there should be a nexus between conditions of community supervision and the underlying offense. Id. See also State v. D.H., 102 Wn. App. 620, 629, 9 P.3d 253 (2000), *rev. denied* 142 Wn.2d 1025 (2001) (juvenile court has considerable discretion to fashion individualized rehabilitative disposition including a broad range of community supervision).

³ State v. J. H., 96 Wn. App. 167, 181, 978 P.2d 1121, *rev. denied*, 139 Wn.2d 1014, 994 P.2d 849 (1999).

Herein, the court ordered a number of “conditions of supervision.”

CP 16. Of these, three conditions are unrelated to the offenses and one condition is an improper delegation of the court’s authority to the Juvenile Department.

a. Improper delegation to probation officer.

The trial court imposed the following offending condition:

H. Respondent shall participate in counseling, outpatient substance abuse treatment programs, outpatient mental health programs, sex offender, and/or anger management classes, as Juvenile Department directs. Respondent shall cooperate fully.

CP 16.

This condition does not reasonably relate to Eddie’s offenses nor are they tailored to his specific needs. Because these conditions permit the probation officer to require Eddie to participate in virtually any rehabilitative program imagined, although not specifically ordered by the court, and without a hearing, they constitute an excessive delegation of the trial court’s authority.

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

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 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.

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).

As stated above, 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 probation not only to oversee the application of rehabilitative 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 of a procedure in

place whereby the court ratifies and adopts as its own the conditions imposed by probation.

Furthermore, Eddie has not been given the right, as was Williams, to contest probation-imposed conditions at a hearing. Accordingly, the offending condition violates due process as well. Although Eddie 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). This court should strike the offending condition.

b. Conditions not tailored to meet Eddie's specific needs or related to his underlying offenses.

The trial court imposed the following three offending conditions:

F. Curfew to be set at the discretion of the Juvenile Department.

...

J. (Partial) Respondent shall refrain from using illegal drugs and alcohol and is subject to random urinalysis as directed by the Juvenile Department and shall fully cooperate.

...

M. (Partial) Respondent shall reside in a placement approved by the Juvenile Department or approved by court order

CP 16.

Condition F (curfew) is unrelated to the offense and is not tailored to Eddie's specific needs. The imposition of a curfew has no rational basis in the facts, and unreasonably impacts Eddie's freedom. This condition must be stricken.

Condition J (refrain from using illegal drugs or alcohol) may relate to the circumstances of Eddie's offenses, but *only* as it relates to illegal drugs. There is nothing in the record to support a reasonable inference that alcohol use is a problem. The portion relating to anything other than alcohol use must be stricken from the condition.

Condition M (living in an approved placement) is not reasonably based on the facts of this case. The record is absolutely silent about why and when the charged offenses took place as it might relate to Eddie's home situation or supervision. Eddie's father was present at the adjudication and/or disposition, and the court expressed no concerns suggesting living conditions were at issue. Condition D (CP 16) already reasonably requires Eddie to advise the probation department of any changes in address. The imposition of this condition was not related to the circumstances of the offense or to Eddie's specific needs. This condition must also be stricken.

D. CONCLUSION

For the reasons stated, the conviction for possession of hydrocodone must be reversed and dismissed with prejudice.

Alternatively, the matter must be remanded to remove the offending conditions of supervision.

Respectfully submitted September 7, 2010.


Susan Marie Gasch
Attorney for Appellant

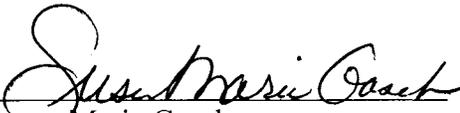
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FOR THE STATE OF WASHINGTON
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Plaintiff/Respondent,)	Court of Appeals No. 28884-6-III
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)	
EDDIE CORTEZ,)	PROOF OF SERVICE (RAP 18.5(b))
Defendant/Appellant.)	

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 7, 2010, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or personally served, a true and correct copy of brief of appellant:

Eddie Cortez
8649 Dorothy Street
Moses Lake WA 98837-3556

D. Angus Lee
Grant County Pros. Attorney Office
P. O. Box 37
Ephrata WA 98823-0037


Susan Marie Gasch