

No. 29579-6-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JACIHEL CONTRERAS,

Defendant/Appellant.

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Appellant's Brief

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DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing community custody up to life as part of the sentence.

2. The trial court erred in imposing certain conditions of community custody as part of the sentence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the sentencing court not have the statutory authority to impose a sentence of community custody up to life where only three years is authorized for the offense under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody?

2. Did the sentencing court exceed its statutory authority by imposing certain conditions of community custody that were not crime-related? Did the court's delegation to a community corrections officer 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?

C. STATEMENT OF THE CASE

Jacihel Contreras pled guilty to two counts of first degree assault.

CP 14-25. He received a standard range sentence. CP 27, 31. As part of the sentence, the court imposed community custody up to life. CP 31.

The court also imposed the following 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 32 at ¶ 4.2(b)(ix).

The defendant shall not possess or consume alcohol.

CP 32 at ¶ 4.2(b)(x)

You are not to use or possess any alcoholic beverages . . .

CP 36, No. 17.

This appeal followed. CP 41-58.

B. ARGUMENT

1. The sentencing court did not have the statutory authority to impose a sentence of community custody up to life where only three years is authorized for the offense under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293

(1980). The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years: . . .

(b) A serious violent offense . . .

RCW 9.94A.701(1)(b).

First degree assault is a serious violent offense. RCW 9.94A.030(44)(a)(v). Under RCW 9.94A.701(1)(b), the amount of community custody authorized is three years, not life. Therefore, the sentencing court did not have the statutory authority to impose a sentence of community custody up to life.

2. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that were 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.

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:

[X] 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 52 at ¶ 4.2(b)(ix).

The defendant shall not possess or consume alcohol.

CP 32 at ¶ 4.2(b)(x)

You are not to use or possess any alcoholic beverages . . .

CP 36, No. 17.

These conditions are unrelated to the crimes for which Contreras was convicted. The condition regarding alcohol/drug treatment further violate due process and is 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. In some instances, 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 at 33, 604 P.2d. Sentencing conditions are reviewed for abuse of discretion. See *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Community custody conditions for the offense at issue here are governed by RCW 9.94A.703, which provides in pertinent part:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. . . .

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to: . . .

(c) Participate in crime-related treatment or counseling services . . .

(e) Refrain from consuming alcohol . . .

RCW 9.94A.703(3)(c) and (e).

Contreras first challenges the conditions imposed that he attend and participate in an inpatient or outpatient alcohol/drug program, if ordered to do so by the supervising Community Corrections Officer. RCW 9.94A.703(3)(c) states that such any treatment programs must be crime related. See also RCW 9.94A.030(10); RCW 9.94A.505(8). Here, there was no evidence that alcohol or drugs were involved in the commission of the crime. The affidavit of probable cause, on which the court relied in establishing a factual basis for the plea, makes no mention

of alcohol. See CP 1-3. Therefore, this condition is unrelated to the crimes of which Contreras was convicted, and must be stricken on that basis.

Contreras also challenges the condition that he not *possess* alcohol. RCW 9.94A.703 (3)(e) allows the trial court to prohibit only the consumption of alcohol, not its possession. The trial court had authority to prohibit Contreras from consuming alcohol regardless of whether alcohol was related to the crime. *Id.* 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). 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 Contreras 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,

not DOC. See RCW 9.94A.030(10)<sup>1</sup>. 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).<sup>2</sup> 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 (3<sup>rd</sup> Cir. 2001) (quoting *United States v. Mohammad*, 53 F.3d 1526, 1538 (7<sup>th</sup> 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

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<sup>1</sup> “ ‘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).

<sup>2</sup> 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.

The original sentencing order advised Williams of his right to a hearing to review the specific conditions of probation that were to

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

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 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.

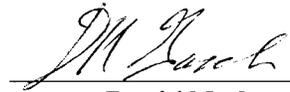
Furthermore, Contreras has not been given the right, as in *Williams*, to contest CCO-imposed conditions at a hearing. Accordingly, the condition violates due process as well. Although Contreras has not been charged with violating the condition, he should not have to wait until that potentiality to challenge it. See, e.g., *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (where a sentence in 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 unauthorized community custody conditions should be stricken and the case remanded with instructions to reduce the amount of community custody to three years.

Respectfully submitted June 24, 2011.



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David N. Gasch  
Attorney for Appellant  
WSBA #18270