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Court of Appeals
Division III
State of Washington

No. 29662-8-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JACK MARLIN AXTMAN,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Kathleen M. O'Connor

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

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

Issue Pertaining to Assignment of Error

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

B. STATEMENT OF THE CASE

Following a jury trial, the defendant, Jack Marlin Axtman, was convicted of rape of a child in the first degree and child molestation in the first degree. CP 71. The court imposed minimum terms of confinement on the two convictions of 140 months and 70 months, respectively, to run concurrently. CP 75; RP 548. Community custody up to the statutory maximum of life is mandatory. RCW 9.94A.507(5).

The court in part imposed the following conditions of community custody:

(6) [That the defendant shall] not own, use, or possess firearms or ammunition;

...

[x] consume no alcohol

[x] [That the defendant shall] undergo an evaluation for treatment for ... [x] substance abuse

CP 76–77, ¶ 4.2(B).

(7) Defendant shall not own, use, or possess a firearm or ammunition ...

CP 68, Appendix H, ¶ (a).

...

(18) That you do not consume or possess alcohol;

(19) That you do not frequent places where alcohol is the chief commodity of sale such as bars, taverns, or lounges;

(20) That you complete substance abuse treatment/alcohol abuse treatment with a qualified provider including that you attend non-clinical [sic] groups such as AA;

...

CP 68, Appendix H, ¶ (b).

This appeal followed: CP 85–86.

C. ARGUMENT

The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are not crime-related.

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)). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Sentencing conditions are reviewed for abuse of discretion. State v. Crockett, 118 Wn. App. 853, 856, 78 P.3d 658 (2003); *see* State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). A crime-related prohibition will be reversed if it is manifestly unreasonable. Riley, 121 Wn.2d at 37 (quoting State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

The Legislature has authorized the imposition of prohibitions and affirmative conduct upon a defendant, provided they are related to the circumstances of the crime. Crockett, 118 Wn. App. at 857; State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). RCW 9.94A.505, the general sentencing statute of the Sentencing Reform Act, provides that, “[A]s a part of any sentence, the Court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. RCW 9.94A.505(8). RCW 9.94A.703(3)(c) and (e) authorize a court to order participation in crime-related treatment or counseling services and compliance with any crime-related prohibition. A “crime-related prohibition” is 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)¹ (emphasis added). A “circumstance” is defined as “[a]n accompanying or accessory fact.” State v. Williams, 157 Wn. App. 689, 692, 239 P.3d 600 (2010).

Community custody conditions for the offenses 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;

(d) ... perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

...

RCW 9.94A.703(3)(c), (d), (e) and (f).

¹ The full text of RCW 9.94A.030(10) provides as follows: “ ‘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.”

1. Prohibition related to firearms. The legislature has determined that a convicted felon may not own, possess or have in his control a firearm. RCW 9.41.040. Here, the court ordered that Mr. Axtman “not own, use, or possess firearms or ammunition”. CP 68, Appendix H, ¶ (a), (7); CP 76, ¶ 4.2(B), (6). Since the legislature has not included ammunition in its prohibition, the imposition of a broader restriction is authorized only if it is crime-related. There was no evidence that ownership, use or possession of ammunition had anything to do with the underlying sex offense convictions. This portion of the condition is not authorized by statute or reasonably related to the circumstances of the crimes of conviction, and the provision should be stricken.

2. Prohibitions related to alcohol. A court may require that an offender not consume alcohol. RCW 9.94A.703(3) (e). Here, the court ordered Mr. Axtman not to consume or possess alcohol, but additionally prohibited him from frequenting places where alcohol is the chief commodity for sale, such as bars, taverns, or lounges. CP 68, Appendix H, ¶ (b), (18), (19). The court did make a finding that alcohol contributed to the offenses. CP 73²; RP 450. Arguably, the “possession” of alcohol would be reasonably crime-related and therefore a valid condition even

² “[x] The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.” CP 73 (bolding in original).

though not specified by the legislature. However, there was no evidence that going to bars, taverns, lounges or other such retail establishments was the source of alcohol used by Mr. Axtman. There are reasons to go to bars other than to drink alcohol. For instance, one might want to watch a sports game on a nicer television screen than the one in his or her home. This prohibition is not reasonably related to the circumstances of Mr. Axtman's offenses, and should be stricken on that basis.

3. *Substance abuse evaluation and treatment.* A court may order an offender to participate in crime-related treatment. RCW 9.94A.703(3)(c). Here, the court ordered Mr. Axtman to obtain a substance abuse evaluation and complete any recommended treatment. CP 68, Appendix H, ¶ (b) (20); CP 77, ¶ 4.2(B). Court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. Jones, 118 Wn. App. at 207–08 (addressing former RCW 9.94A.700 and former RCW 9.94A.715, which contained the same operative language as RCW 9.94A.703(3)(c) and (f)).

The court found that that Mr. Axtman had a “chemical dependency” that contributed to the offenses, based on his alcohol use. CP 73; RP 449–50.³ However, there is no evidence in the record to indicate Mr. Axtman used controlled substances or had any form of drug dependency. Under the Sentencing Reform Act, a substance abuse condition can be imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant’s crime. Jones recognized a difference between controlled substances and alcohol in holding that alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense. Jones, 118 Wn. App. at 202; *see also* State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between “substance abuse” and “alcohol” treatment as a condition of community custody), *disapproved on other grounds*, State v. Valencia, 169 Wn.2d 782, 790–91, 239 P.3d 1059 (2010).

Because the record is devoid of any evidence of drug abuse or dependency, the imposition of “substance abuse” evaluation and treatment

³ The SRA does not define “chemical dependency”. Under Title 18, Businesses and Professions, Chapter 18.205, Chemical Dependency Professionals, chemical dependency appears to encompass both alcohol and drug addiction. " ‘Chemical dependency counseling’ means employing the core competencies of chemical dependency counseling to assist or attempt to assist an alcohol or drug addicted person to develop and maintain abstinence from alcohol and other mood-altering drugs.” RCW 18.205.020(4).

as a condition of community custody was beyond the court's authority.⁴
The offending condition must be stricken. Jones, 118 Wn. App. at 207–
08, 212.

D. CONCLUSION

For the reasons stated, the matter should be remanded for
resentencing to remove the offending conditions.

Respectfully submitted on November 18, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on
November 19, 2011, I mailed to the following by U.S. Postal Service first
class mail, postage prepaid, or provided e-mail service by prior agreement
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⁴ In its oral ruling, the court specified that Mr. Axtman “complete a substance abuse
assessment for alcohol, follow any recommended treatment, including any support groups
such as AA.” RP 553. Clearly, the court did not consider that drug evaluation and
treatment was crime-related and necessary.