

29662-8-III
COURT OF APPEALS

FILED
Jan 11, 2012
Court of Appeals
Division III
State of Washington

DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACK M. AXTMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENT OF ERROR

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

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT ERR IN IMPOSING A CONDITION OF NO POSSESSION OF AMMUNITION?
- B. DID THE TRIAL COURT ERR IN IMPOSING A CONDITION OF NO CONSUMPTION OF ALCOHOL ALONG WITH A CONDITION OF NOT FREQUENTING BUSINESSES WHERE ALCOHOL IS THE CHIEF COMMODITY SOLD?
- C. DID THE TRIAL COURT ERR IN IMPOSING A CONDITION OF SUBSTANCE ABUSE EVALUATION AND TREATMENT FOR ALCOHOL USE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THE STATUTES SPECIFICALLY MENTION
AMMUNITION ALONG WITH FIREARMS.

The defendant claims that the legislature has prohibited a convicted felon from owning, possessing, or exerting control over a firearm. RCW 9.41.040. The defendant then claims that the legislature did not include ammunition in its prohibition thus making an ammunition prohibition “crime related.” Brf. of App. 5.

RCW 9.41.045 provides the following language:

As a sentence condition and requirement, offenders under the supervision of the department of corrections pursuant to chapter 9.94A RCW shall not own, use, or possess firearms or *ammunition*. In addition to any penalty imposed pursuant to RCW 9.41.040 when applicable, offenders found to be in actual or constructive possession of firearms or *ammunition* shall be subject to the appropriate violation process and sanctions as provided for in RCW 9.94A.633, 9.94A.716, or 9.94A.737. Firearms or *ammunition* owned, used, or possessed by offenders may be confiscated by community corrections officers and turned over to the Washington state patrol for disposal as provided in RCW 9.41.098.

RCW 9.41.045.

There is nothing in the statutes or existing caselaw that requires that an ammunition restriction be “crime related.” The defendant’s argument is faulty and the sentencing condition should stand.

B. THE TRIAL COURT PROPERLY PROHIBITED THE DEFENDANT FROM FREQUENTING BARS, TAVERNS OR LOUNGES.

The trial court ordered a prohibition on the defendant against consuming or possessing alcohol. The defendant agrees that the trial court had the authority to impose such a restriction under RCW 9.94A.703(3)(e). The trial court also prohibited the defendant from frequenting establishments that sell alcohol as their chief commodity. CP 67-68 The defendant takes issue with this restriction.

The trial court's imposition of an alcohol related prohibition is straightforward: "No alcohol." RP 553.

The defendant cites *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003) in support of his arguments. The defendant fails to make a sufficiently detailed analysis of *Jones*. The case is inapposite for the facts adhering in this case as *Jones* was dealing with alcohol *counseling* not just a prohibition against consuming alcohol. A closer reading of *Jones* shows that it actually supports the lower court's imposition of the condition against frequenting establishments where alcohol is the primary commodity for sale. *Jones, supra* at 207.

It is true that the *Jones* court held that alcohol counseling was a crime related prohibition. *Jones, supra* at 207. It is also correct that *Jones* stands for the proposition that a crime related prohibition must be related

to the crime in question or the trial court exceeds its statutory authority to impose the condition. *Jones, supra* at 207-08.

However, the *Jones* court also notes that the legislature left out the words, “crime related” when listing “The offender shall not consume alcohol” in RCW 9.94A.700(5)(d). *Jones, supra* at 206. The legislature included the “crime related” language in the other conditions. As stated by the *Jones* court, the omission of the “crime related” language indicates that the legislature intended to permit the court to prohibit the consumption of alcohol, crime related or not. *Jones, supra* at 206. The condition in question is a logical adjunct to the condition against consuming alcohol. It would be difficult, if not impossible, for the DOC to monitor the defendant for compliance with conditions if he is in an establishment that is primarily serving alcohol. The prohibition against frequenting taverns, bars or lounges is a logical extension of the original prohibition against consuming/possessing alcohol.

The condition of not frequenting alcohol selling businesses does not need to be “crime related.” It is a logical adjunct to the prohibition against possessing or consuming alcohol. The “no alcohol” condition does not need to be related to the crime as shown previously. The trial court made no error in imposing either condition.

C. THE TRIAL COURT DID NOT ORDER A
GENERAL SUBSTANCE ABUSE EVALUATION
AND TREATMENT.

The defendant contests what the defendant calls a court-ordered “...substance abuse evaluation...” and the completion of any recommended treatment. Brf. of App. 6. The defendant goes on to argue that the record does not show that the defendant had a substance abuse problem. The State agrees.

A problem arises in this issue because the defendant has left out part of the court’s holding. The trial court did not order general substance abuse evaluation and treatment. What the trial court ordered was: “That he complete a substance abuse assessment *for alcohol*, follow any recommended treatment, including any support groups such as AA, and obey all laws.” RP 553 (emphasis added). The defendant left out the language that limited the assessment and treatment to alcohol. It is correct that the language of the condition as reflected in the Judgment and Sentence is less than ideal and could be construed to include substances other than alcohol. However, the language of the court was quite clear in ordering an assessment for alcohol abuse. The trial court added the language, “...including any support groups such as AA....” RP 553. Such a proviso would not be applicable to a drug abuse situation. AA only deals with alcohol.

The State would join in an order by the trial court correcting the scrivener's error in the Judgment and Sentence that includes a "/" in the sentencing condition as presented in the Judgment and Sentence. The "/" confuses the condition and does not make it clear that the trial court is referring to alcohol evaluation as put forth in the court's oral ruling. RP 553.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 11th day of January, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29662-8-III
 v.)
)
JACK M. AXTMAN,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on January 11, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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1/11/2012
(Date)

Spokane, WA
(Place)

Patricia H. Caveness
(Signature)