



29666-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT R. ELLISON, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

APPELLANT'S BRIEF

---

Janet G. Gemberling  
Attorney for Appellant

Jill S. Reuter  
Attorney for Appellant

GEMBERLING & DOORIS, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585



29666-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT R. ELLISON, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

APPELLANT'S BRIEF

---

Janet G. Gemberling  
Attorney for Appellant

Jill S. Reuter  
Attorney for Appellant

GEMBERLING & DOORIS, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585

**INDEX**

A.	ASSIGNMENTS OF ERROR .....	1
B.	ISSUES .....	1
C.	STATEMENT OF THE CASE.....	2
D.	ARGUMENT .....	6
	1. THE TRIAL COURT IMPOSED AN UNAUTHORIZED COMMUNITY CUSTODY CONDITION UNRELATED TO EITHER OF THE CHARGED CRIMES.....	6
	2. THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.....	9
E.	CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. AUTREY, 136 Wn. App. 460,  
150 P.3d 580 (2006)..... 7

STATE V. BAHL, 164 Wn.2d 739,  
193 P.3d 678 (2008)..... 6

STATE V. FORD, 137 Wn.2d 472,  
973 P.2d 452 (1999)..... 6

STATE V. HEALY, 157 Wn. App. 502,  
237 P.3d 360 (2010)..... 10

STATE V. NAILLIEUX, 158 Wn. App. 630,  
241 P.2d 1280 (2010)..... 10

STATE V. O'CAIN, 144 Wn. App. 772,  
184 P.3d 1262 (2008)..... 7, 9

STATE V. ZIMMER, 146 Wn. App. 405,  
190 P.3d 121 (2008)..... 7, 9

**STATUTES**

24 CFR § 5.100 ..... 4

24 CFR § 966.4 ..... 4

FORMER RCW 9.94A.700(5)(e)..... 7

RCW 9.94A.030(10)..... 7, 9

RCW 9.94A.703(3)(f)..... 1, 6, 7

RCW 9A.44.130..... 8

RCW 9A.44.132..... 2, 8

RCW 72.09.310 ..... 2, 8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a condition of community custody that is not authorized by statute.
2. The judgment and sentence erroneously imposed costs that were not ordered by the sentencing judge.

B. ISSUES

1. The defendant was convicted of failing to register and escape from community custody. The court imposed a condition of community custody barring him from living with anyone in subsidized housing without permission of the premises manager. Was this condition authorized by RCW 9.94A.703(3)(f) which authorizes the court to “order an offender to comply with any crime-related prohibitions”?
2. The judgment and sentence states that Mr. Ellison owes 200 dollars in court costs. The sentencing court waived court costs. Should this error in the judgment and sentence be corrected?

C. STATEMENT OF THE CASE

The State charged Robert R. Ellison with one count of failure to register as a sex offender, in violation of RCW 9A.44.132, and one count of escape from community custody, in violation of RCW 72.09.310. (CP 4-5). The count of failure to register as a sex offender alleged that Mr. Ellison:

[D]id, during a period of time intervening between July 13, 2010 and August 9, 2010, knowingly fail to comply with the requirements of RCW 9A.44.130, to-wit: the requirement, when changing his or her residence address within the same county, to provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address to the county sheriff within three business days; **and/or** the requirement that a person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he is registered.

(CP 4).

The count of escape from community custody alleged that Mr. Ellison:

[O]n or about between [sic] July 26, 2010 and August 09, 2010, while an inmate in community custody, did willfully discontinue making himself . . . available to the department for supervision by (a) making his whereabouts unknown; or (b) failing to maintain contact with the department as directed by the community corrections officer[.]

(CP 5).

Mr. Ellison waived his right to a jury, and the case was tried to the court. (RP 7-163).

Mr. Ellison has a duty to register as a sex offender. (RP 16-17; Ex. P-1). According to Spokane County Sheriff's Detective David Bentley, Mr. Ellison came into the Spokane County Sheriff's Office on June 22, 2010, registered a new address of transient, and listed a mailing address of 1423 North Wall, number 7, in Spokane. (RP 35-38; Ex. P-9). Detective Bentley told the court that Mr. Ellison came into the Spokane County Sheriff's Office on July 6, 2010, and on a "transient form" listed the same Wall address as "[p]lace or area of Spokane where you're staying." (RP 38; Ex. P-10).

Mr. Ellison's mother, Shara Walker, testified that her address is 1423 North Wall, apartment number 7, in Spokane. (RP 69, 77). She said that Mr. Ellison has lived with her at this address. (RP 70-71). She told the court he last stayed with her for approximately three weeks, and she estimated that this was in June or July. (RP 70-71). According to Ms. Walker, after leaving her residence, Mr. Ellison went to his brother's house, and then his sister's house. (RP 70-72). She testified that Mr. Ellison was not on the lease for her apartment. (RP 72).

Ms. Walker acknowledged that she is not permitted to have people live with her, and that according to her lease, she can only have visitors

stay for two weeks. (RP 70, 74-75). She testified that she is on HUD. (RP 75-76, 78).

Mr. Ellison's Community Corrections Officer James Hathaway testified that he met with Mr. Ellison on June 29, 2010. (RP 88-89, 91-92).

Officer Hathaway testified that they discussed Mr. Ellison's residence:

So he asked if he could stay at his mother's. I did not like that idea, but I did give him permission to stay there for a night or two until he could find something else. So he was in the process of looking for another residence. His mother lives in HUD housing, so he's not allowed to stay there.

(RP 88-89, 91-92).<sup>1</sup>

Officer Hathaway testified that Mr. Ellison met with him again on July 1, 2010. (RP 88, 92, 108). He stated that he directed Mr. Ellison to report back on July 6, 2010, and that he "never heard from him again."

---

<sup>1</sup> HUD regulations relating to the accommodation of guests are as follows:  
(d) Tenant's right to use and occupancy.

(1) The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests. The term guest is defined in 24 CFR 5.100.

24 CFR § 966.4.

Guest, only for purposes of 24 CFR part 5, subparts A and I, and parts 882, 960, 966, and 982, means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. The requirements of parts 966 and 982 apply to a guest as so defined.

24 CFR § 5.100

The regulations do not define the term "temporary."

(RP 92-93, 107-108). He said that Mr. Ellison called him on the phone on August 4, 2010, and that he would not tell him where he was staying. (RP 93, 95-96).

Detective Bentley told the court that after July 6, 2010, Mr. Ellison did not return to the Spokane County Sheriff's Office. (RP 39). On August 9, 2010, Mr. Ellison was arrested at his sister's apartment. (RP 66).

The trial court found Mr. Ellison guilty as charged. (CP 15-18, 21-22, 24; RP 163-168). The trial court imposed a sentence including 36 months of community custody, and as condition, ordered that Mr. Ellison be "barred from residing either as a transient 'visitor' or fixed resident w/ anyone in subsidized housing unless . . . on lease & residing there w/ permission of the premises owner/management." (CP 25-26; RP 173, 185-186). Mr. Ellison did not object to the imposition of this condition. (RP 173, 185-186).

The trial court waived the court costs. (RP 186). But, the judgment and sentence lists 200 dollars in court costs owed. (CP 26). The total legal financial obligations owed does correctly reflect a total of 600 dollars owed, comprising a 500 dollar victim assessment and a 100 dollar DNA collection fee ordered by the trial court. (CP 26-27; RP 186).

Mr. Ellison appealed. (CP 35-36).

#### D. ARGUMENT

##### 1. THE TRIAL COURT IMPOSED AN UNAUTHORIZED COMMUNITY CUSTODY CONDITION UNRELATED TO EITHER OF THE CHARGED CRIMES.

As a community custody condition, the trial court ordered that Mr. Ellison be “barred from residing either as a transient ‘visitor’ or fixed resident w/ anyone in subsidized housing unless . . . on lease & residing there w/ permission of the premises owner/management.” (CP 25-26; RP 173, 185-186). Although Mr. Ellison did not object to the imposition of this condition, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

“As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (*citing State v. Autrey*, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006)). A “[c]rime-related

prohibition” is defined, in relevant part, as “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); *see also State v. O’Cain*, 144 Wn. App. 772, 184 P.3d 1262 (2008).

In *State v. O’Cain*, the defendant was convicted of second-degree rape. *O’Cain*, 144 Wn. App. at 774. As a community custody condition, the trial court ordered that the defendant “not access the Internet without the prior approval of [his] supervising Community Corrections Officer and sex offender treatment provider.” *Id.* The reviewing court held that pursuant to the statute in effect at the time<sup>2</sup>, the trial court erred by imposing this condition. *Id.* at 775. The court reasoned “[t]here is no evidence in the record that the condition in this case is crime-related” and “[t]here is no evidence that [the defendant] accessed the internet before the rape or that internet use contributed in any way to the crime.” *Id.* The court ordered that the condition be stricken on remand. *Id.*; *see also Zimmer*, 146 Wn. App. at 413-414 (holding that the trial court abused its discretion in imposing a community custody condition prohibiting the defendant from possessing a cellular phone and handheld electronic data devices, because the prohibition was not crime-related).

---

<sup>2</sup> *See* former RCW 9.94A.700(5)(e) (2004). This statute contained the same language as the statute applicable here, allowing the court to order a defendant to “comply with any crime-related prohibitions.” RCW 9.94A.703(3)(f); former RCW 9.94A.700(5)(e) (2004).

The fact that Mr. Ellison had resided with anyone in subsidized housing, presumably Ms. Walker, was not related to either of the charged crimes. Mr. Ellison did not commit the crimes of failure to register as a sex offender or escape from community custody by residing in subsidized housing. Rather, he committed the crime of failure to register as a sex offender by either (1) changing his residence address within the same county, and knowingly failing to provide notice of this change to the county sheriff within three business days; or (2) if he lacked a fixed residence, reporting weekly to the county sheriff. (CP 4); *see also* RCW 9A.44.132; RCW 9A.44.130. Under (1), Mr. Ellison would have moved from Ms. Walker's residence. Under (2), Mr. Ellison would be transient, and therefore not residing with Ms. Walker.

Mr. Ellison committed the crime of escape from community custody by willfully discontinuing making himself available to the Department of Corrections for supervision, by either "[1] making his whereabouts unknown; or [2] failing to maintain contact with the department as directed by the community corrections officer." (CP 5); *see also* RCW 72.09.310. Residing in subsidized housing, presumably with Ms. Walker, is not related to either of these circumstances.

Because residence in subsidized housing was not related to the circumstances of either crime, the community custody condition

prohibiting Mr. Ellison from residing with anyone in subsidized housing under specified circumstances was not a “[c]rime-related prohibition.” RCW 9.94A.030(10); *see also O’Cain*, 144 Wn. App. at 744-45; *Zimmer*, 146 Wn. App. at 413-14. Accordingly, this court should remand this case with an order that the trial court strike the community custody condition prohibiting Mr. Ellison from residing with anyone in subsidized housing, either as a visitor or resident, unless he is on the lease and residing there with permission of the premises owner and management. *See O’Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

2. THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.

The judgment and sentence correctly lists the total legal financial obligations owed as 600 dollars, comprising a 500 dollar victim assessment and a 100 dollar DNA collection fee ordered by the trial court. (CP 26-27; RP 186). However, the judgment and sentence also states that Mr. Ellison owes 200 dollars in court costs. (CP 26). The trial court waived the court costs. (RP 186). Therefore, this court should remand this case for correction of the judgment and sentence to reflect no court costs owing. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in

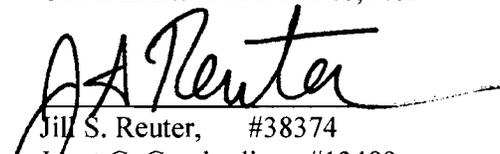
judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

E. CONCLUSION

This court should order the trial court to strike the community custody condition prohibiting Mr. Ellison from residing with anyone in subsidized housing, either as a visitor or resident, unless he is on the lease and residing there with permission of the premises owner and management. This court should also order the trial court to correct the error in the judgment and sentence regarding court costs.

Dated this 5th day of July, 2011.

GEMBERLING & DOORIS, P.S.



Jil S. Reuter, #38374  
Janet G. Gemberling #13489  
Attorneys for Appellant

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

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )  
  )  
                                  vs.                )  
  )  
ROBERT R. ELLISON,            )  
  )  
                                  Appellant.    )  
\_\_\_\_\_

No. 29666-1-III  
CERTIFICATE  
OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that on July 5, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey  
mlindsey@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on July 5, 2011, I mailed a copy of the Appellant's Brief in this matter to:

Robert R. Ellison  
#833008  
Airway Heights Correction Ctr.  
PO Box 2049  
Airway Heights, WA 99001

Signed at Spokane, Washington on July 5, 2011.

  
Janet G. Gemberling #13489