

FILED

AUG 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S 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.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT EXCEED ITS DISCRETION BY ORDERING A CONDITION OF NOT RESIDING IN SUBSIDIZED HOUSING WITHOUT THE KNOWLEDGE AND PERMISSION OF THE MANAGER?
- B. DOES THE JUDGMENT AND SENTENCE PROPERLY REFLECT THE DEFENDANT'S LEGAL FINANCIAL OBLIGATIONS?

III.

STATEMENT OF THE CASE

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

IV.

ARGUMENT

- A. THE SENTENCING COURT DID NOT EXCEED ITS AUTHORITY BY IMPOSING A LIVING CONDITION AS PART OF COMMUNITY SUPERVISION.

On appeal the defendant fails to note the facts available to the sentencing court. This conviction for failure to register is not the first one for this defendant. *See* CP 11-12; 20-34; P3-P8. According to the prosecutor at sentencing, on two different occasions the defendant claimed to be residing at his mother's subsidized residence. RP 173. However, when law enforcement attempted to contact the defendant at his mother's residence, she told the officers that because the housing is subsidized, the defendant is not allowed to stay there. RP 173. Apparently, this has been an ongoing problem.

The sentencing condition does not prohibit the defendant from residing at a subsidized residence, it only requires that the defendant notify the manager and receive permission to stay at a particular residence. RP 173.

The defendant did not object to the requested condition during his allocution. The defense counsel did not challenge the prosecutor's discussion of criminal history nor did defense counsel challenge the requested condition. It is difficult to see how the defendant is prejudiced by the residence condition as, according to the mother, the defendant cannot reside with her. Presumably, if the manager of the subsidized housing approved the living arrangements, nothing in the condition would prohibit the defendant from residing with his mother.

The appellate courts review the imposition of crime-related prohibitions for an abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). The trial court will be reversed only if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Drawing a connection between a prohibition and the underlying crime "...will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (quoting David Boerner, *Sentencing in Washington*, § 4.5 (1985)). There does not necessarily need to be a causal link between the condition imposed and the crime

committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (citing *Parramore*, *supra* at 527. The court in *Parramore* affirmed a community supervision condition relating to a drug conviction even when there was no evidence of the defendant actually using drugs. *Parramore*, at 532. While the *Parramore* court was analyzing the former RCW 9.94A.030 version of “crime related prohibitions,” the case is still instructive here.

While there is no “direct” connection between the contested condition and the actual crime, the law is not as “black and white” as the defendant would argue. The sentencing judge was attempting to foreclose a known evasive technique used by the defendant in former “failure to report crimes.” This sentencing condition does not prevent the defendant from any action except the improper use of subsidized housing. The condition only requires the defendant to conform his behavior to that of a responsible person. This condition should be upheld as being within the scope of the sentencing court’s discretion.

B. THERE WAS NO ERROR IN THE LEGAL FINANCIAL OBLIGATIONS IMPOSED ON THE DEFENDANT.

The first amount listed on the Judgment and Sentence is a \$500 crime victim penalty assessment. CP 20-34. RCW 7.68.035 provides as follows:

(1)(a) When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there *shall* be imposed by the court upon such convicted person a penalty assessment. The assessment *shall* be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a) (emphasis added).

The Superior Court had no option but to impose the penalty assessment as it is worded as “shall” with no provision for waiver. The Washington State Supreme Court has reviewed an earlier version of this statute which could not be waived. The Court found the statute constitutional. *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992).

As for the imposition of \$100 for DNA testing, RCW 43.43.7541 reads in part: “Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” RCW 43.43.7541. Before this statute was amended in 2008, the

language provided an “out” for court’s wishing to waive this fee. The waiver language was removed in 2008. Like the previously discussed statute, the court could not waive this fee.

A total of the two non-waivable fees is \$600. This is the amount listed in the Judgment and Sentence. CP 20-34. There was no error.

V.

CONCLUSION

For the reasons stated, the decisions of the trial court should be affirmed.

Dated this 17th day of August, 2011.

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DIVISION III
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 29666-1-III
v.)	
)	CERTIFICATE OF MAILING
ROBERT R. ELLISON,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on August 17, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Janet G. Gemberling
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and mailed a copy to:

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8/17/2011
(Date)

Spokane, WA
(Place)

Janet G. Gemberling
(Signature)