

NO. 29767-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM D. MILLER,

Appellant.

FILED
Nov 29, 2011
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable Donald W. Schacht, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT'S COMMUNITY CUSTODY CONDITION THAT PROHIBITS MILLER FROM HAVING ANY CONTACT WITH ANY PROBATIONER OR PAROLEE IS IMPROPER.

In the Brief of Appellant (BOA), Miller contended the sentencing condition prohibiting him from associating with "any individuals who are on prohibition or parole" is so broad as to infringe on his First Amendment right of association. BOA at 7-12. Citing Overton v. Bazetta,¹ the state in response observes an incarcerated person loses many of the privileges and liberties, including the freedom of association, enjoyed by other individuals. Brief of Respondent (BOR) at 7. Miller agrees with this obvious fact; as the Supreme Court found, "freedom of association is among the rights least compatible with incarceration." Bazetta, 539 U.S. at 131.

At issue in Bazetta was whether a rule limiting certain high-risk inmates to noncontact visitation unlawfully infringed on the constitutional right of association. Id. at 131. The Court found the challenged regulations were reasonably related to legitimate prison interests, especially maintaining order during visitation and preventing smuggling or trafficking in drugs. Id. at 129, 132.

¹ 539 U.S. 126, 131, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003).

Bazetta does not apply to Miller's case. Community custody conditions by definition do not apply to incarcerated offenders. Attempting to create a link, however, the state asserts "the prohibition regarding associating with other parolees bears a reasonable relationship to a legitimate community custody interest[.]" namely, discouraging further criminal conduct. BOR at 7. It is logical, according to the state, that limiting Miller's contact "with other lawbreakers will discourage his further criminal conduct." BOR at 7.

While perhaps superficially logical, the state asks this Court to sanction a condition that is so broad as to be pointless. As this Court held, the sentencing condition must relate to the circumstances of the crime. State v. Hearn, 131 Wn. App. 601, 609, 128 P.3d 139 (2006) (citing State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992)); see, e.g., United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991) ("Probation conditions may seek to prevent reversion into a former crime-inducing lifestyle by barring contact with old haunts and associates, even though the activities may be legal.").

Cases the state cites make Miller's argument. In United States v. Soltero, the court upheld conditions prohibiting the offender from associating with his specific street gang. 510 F.3d 858, 865-66 (9th Cir. 2007). The court struck, however, a condition prohibiting association with

a known member of a "disruptive group," finding the condition overly broad and an unjustified substantial infringement on the offender's First Amendment rights. Soltero, 510 F.3d at 867.

In United States v. Ross, 476 F.3d 719, 722 (9th Cir. 2007), the court's condition prohibiting association with known neo-Nazi/white supremacist members or affiliates and possession of neo-Nazi/white supremacist paraphernalia was upheld. The evidence established the offender possessed white supremacist paraphernalia, participated in an internet white supremacist "chat room" about weapons, and distributed leaflets produced by a known white supremacist group. See also United States v. Johnson, 626 F.3d 1085, 1091 (9th Cir. 2010) (discussing Soltero, court finds condition prohibiting association with persons associated with the Rollin' 30's gang was plain error; the court held the "condition sweeps too broadly because it encompasses not only those who are involved in the gang's criminal activities, but also those who may have only a social connection to an individual gang member.").

The only relationship between Miller and probationers and parolees is that both have committed some type of crime. By barring contact with any type of court-supervised convicted offender, the trial court here failed to consider the circumstances of Miller's crimes. This Court should order the condition stricken.

2. THE TRIAL COURT'S FINDING THAT MILLER HAD A CHEMICAL DEPENDENCY THAT CONTRIBUTED TO THE OFFENSE IS UNSUPPORTED BY THE EVIDENCE.

In the Brief of Appellant, Miller contended the trial court's finding that he had a chemical dependency must be stricken because (1) the finding was not supported by evidence and (2) the trial court did not follow RCW 9.94A.500(1), which requires a chemical dependency screening report or a specific waiver of the report by the court. BOA at 12-15.

The state argued the evidence was sufficient to support the finding, noting Miller "possessed methamphetamine, marijuana, four drug pipes, and a digital scale." Brief of Respondent at 10. The prosecutor then surmised that Miller's "refusal to acknowledge use in the face of this evidence only evidences his denial of the problem." *Id.*

Miller urges this Court to reject this analysis. The police lawfully seized from Miller's truck a baggie containing marijuana and a glass tube or pipe with residue that tested positive for methamphetamine. 2RP 144-51, 168-77, 180-86, 198-201. This evidence was admitted over Miller's motion to suppress. CP 9-15, 17-20.

In a search of Miller's home, police found three other pipes, a wooden smoking kit, and a digital scale. See CP 4-5 (Certificate of Probable Cause, explaining what police found in home). The trial court ordered this evidence suppressed "because there was no probable cause established" to search Miller's home. CP 18. The state cited to the probable cause certificate in its statement of facts, thereby implying it was admitted evidence. BOR at 3. The state also relied on the suppressed evidence when it argued Miller's chemical dependence was established because he refused to acknowledge use in the face of evidence that included "four drug pipes and a digital scale." BOR at 10.

This is improper argument. "Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts." State v. Grayson, 154 Wn.2d 333, 338-39, 111 P.3d 1183 (2005). In determining whether to impose a standard range sentence a trial judge "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing[.]" RCW 9.94A.530(2).

Just as the trial court could not properly rely on the suppressed evidence to find Miller chemically dependent, neither can this Court. Therefore, in determining whether the evidence supported the trial court's finding, this Court should consider only the evidence seized from the

truck, namely, a glass tube with methamphetamine residue and a baggie containing a small amount of marijuana.

This evidence, as well as the remaining properly admitted evidence, does not support the trial court's finding. The state's claim that Miller's "refusal to acknowledge use" supports the finding lacks merit. Miller's defense at trial was that he did not use drugs and did not know the evidence was in his truck. 2RP 293-94. He maintained this consistent position during sentencing. His failure to "acknowledge" he not only knew the evidence was in his car but that he used the drugs hardly supports a finding of chemical dependency.

Additionally, the state presented no evidence Miller was under the influence of narcotics at the time of either the theft to which he pleaded guilty or to the assault incident with the police officer. Finally, Miller had no prior drug-related convictions or any felony convictions at all.

Moreover, the state fails to connect Miller's unwitting possession claim with chemical dependency, which means "[a]lcoholism; drug addiction; or dependence on alcohol and one or more other psychoactive chemicals, as the context requires." RCW 70.96A.020(4). There is no evidence of any of these maladies in the record on appeal. Furthermore, absent an admission, expert testimony, or documentation such as a chemical dependency screening report, a trial judge is in no position to

conclude someone is an alcoholic or addict simply because of possession of small amounts of drugs.

For these reasons, the trial court's finding that Miller was chemically dependant is unsupported. This Court should order the finding stricken.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY ORDERING HIV TESTING.

In the Brief of Appellant, Miller argued the trial court erred by ordering an HIV test under RCW 70.24.340, because it did not first find any of Miller's drug offenses were associated with the use of hypodermic needles. BOA at 15-16. The state contends the HIV testing was properly ordered under RCW 9.94A.703(3)(d), which authorizes a sentencing court to order an offender to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]"

For several reasons, Miller urges this Court to reject the state's analysis. Most importantly, the trial court did not impose the HIV testing under RCW 9.94A.703(3)(d). The court's order instead states as follows: "The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing.

RCW 70.24.340." Because the court did not make the necessary finding under the statute it expressly relied on, this Court should order the condition stricken.

Furthermore, HIV testing does not reasonably relate to the circumstances of Miller's drug offenses or community safety. Even when considering the suppressed evidence,² as well as Officer Bolster's testimony that methamphetamine could be injected,³ there is no proof Miller used the drug in this manner. For example, police found no hypodermic needles, spoons, tin foil, or any other tools of the intravenous user. Nor was there testimony Miller had marks on his arms consistent with regular injection.

The state baldly asserts that the discovery of four pipes (three of which were suppressed because they came from the house) suggests Miller did not use alone. Setting aside the purely speculative nature of the state's claim, it remains that pipes are suggestive of smoking or inhaling, not

² The state asserts Miller's "home and car were littered with drug paraphernalia and at least four pipes, suggesting that he did not use alone, but with others." BOR at 11-12.

³ As Miller set forth in the Brief of Appellant at 15, Officer Bolster testified methamphetamine could be "[s]moke[d], injected, snorted, eaten, placed as a suppository, anything to get it into your system" 2RP 201-02.

injecting. That Miller possessed pipes rather than needles strengthens, not weakens, his argument the trial court erred by ordering the HIV testing.

Because there was no evidence to support the HIV testing, this Court should order the condition stricken.

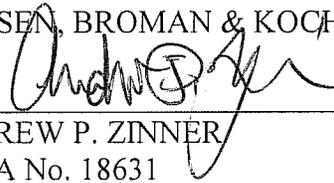
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should order the three challenged sentencing conditions stricken.

DATED this 29 day of November, 2011.

Respectfully submitted,

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v.)	COA NO. 29767-5-III
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WILLIAM MILLER,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF NOVEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF NOVEMBER, 2011.

x *Patrick Mayovsky*