

FILED

Aug 31, 2011

Court of Appeals

Division III

State of Washington

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.

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

The Honorable Donald W. Schacht, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by prohibiting the appellant, William D. Miller, from associating with probationers and parolees during community custody. CP 85 (condition 7).

2. The trial court erred by finding Miller "has a chemical dependency that has contributed to the offense(s)." CP 76.

3. The trial court erred by ordering Miller to "fully cooperate" in HIV testing under RCW 70.24.340. CP 82.

Issues Pertaining to Assignments of Error

1. Did the trial court violate Miller's constitutional right to association by prohibiting contact with all probationers and parolees, because the condition was not narrowly drawn to foster the needs of the public and maintain public order?

2. Did the trial court err by finding Miller's chemical dependency contributed to the crimes where there was no evidence establishing Miller was chemically dependent?

3. Did the trial court exceed its statutory sentencing authority by ordering Miller to cooperate in HIV testing without first determining, as required by RCW 70.24.340, Miller's drug crimes were "associated with the use of hypodermic needles?"

B. STATEMENT OF THE CASE

While patrolling the streets of Walla Walla, Officer Kevin Huxoll saw William D. Miller park his pickup truck, let his dogs out, and walk toward the residence. 2RP 113, 117. Huxoll, in uniform and driving a patrol car, pulled in behind and parked so he could talk with Miller about an arrest warrant. 2RP 115-17. Huxoll told Miller he needed to talk with him and to put the dogs inside. 2RP 118. Miller let the dogs into the house and as he started to follow, Huxoll told him to stop and come back out. Miller turned around, said he had to use the restroom, and went into the house. 2RP 118.

Huxoll waited until Miller emerged from the house two or three minutes later. 2RP 119-20. Miller had a telephone in his hand and was speaking with someone. Huxoll commanded Miller to come to the sidewalk, but Miller instead walked straight to his truck, got in through the still-open driver's door, and slid the rear window closed. Huxoll approached and grabbed Miller's arm with both hands as Miller alighted. Only then did he tell Miller he was under arrest. 2RP 119-21.

Miller, while continuing to speak on the phone, told Huxoll he wanted to lock the open truck door. Huxoll again told Miller he was under arrest and needed to stop resisting. As Miller tried to close the door and

Huxoll tried to control him, Huxoll found himself between the truck cab and the open door. As he swung the door closed, Miller pushed the door into Huxoll and continued to push with the weight of his body against the door. 2RP 122-23. Meanwhile, Huxoll continued to hold Miller's arm. He managed to slide out of his predicament but not before the door slammed against his arm before closing. 2RP 124.

Miller continued with his phone conversation while ignoring Huxoll's commands to desist. At this point, Huxoll executed a "foot sweep" that sent Miller to the ground. With the help of then-arriving fellow officer Matthew Greenland, Huxoll handcuffed Miller. 2RP 125-28, 261-64. The situation finally under control, Huxoll searched Miller and placed him into his patrol car. 2RP 128-29.

Huxoll suspected Miller may have been so determined to lock his truck because he was trying to hide something inside. 2RP 129, 163. His suspicion aroused, Huxoll called dog handling officer Gunner Fulmer to the scene for a drug-detecting sniff around Miller's truck. 2RP 129.

Fulmer "applied" the dog to the outside of Miller's truck. The dog "alerted," or indicated he smelled drugs, at the passenger's door seam and again at the driver's door seam. 2RP 165. Fulmer reported same to Huxoll and secured the dog. Fulmer then went back and peered into the locked

truck through the windows. 2RP 166. He observed a "small plastic baggie of vegetable matter sitting [*sic*] just sticking out from underneath that driver's seat." 2RP 190.

Fulmer left the scene and applied for a warrant to search and seize Miller's truck while another officer watched the vehicle. A judge authorized issuance of the warrant and the police towed Miller's truck to a secure impound lot. 2RP 166. Fulmer searched the interior and seized the baggie he had seen from outside the truck. He also collected a glass tube or pipe with residue and a burnt spot that he found in a pouch on the driver's seat cover. 2RP 167-77, 183-86. He placed the pipe on the driver's seat and took a photo, which was admitted into evidence as Exhibit 8. 2RP 174, 178.

A test of the residue found detected methamphetamine. 2RP 144-51, 180-81, 186. The baggie retrieved from the floorboard contained marijuana. 2RP 198-201.

Walla Walla County Sheriff's Detective Gary Bolster testified the glass pipe depicted in Exhibit 8 "would be a glass tube used as a smoking device for methamphetamine." 2RP 203. Over Miller's relevance objections, Bolster was allowed to tell jurors he found such paraphernalia in about "95 percent" of cases involving suspected drug users. 2RP 219-

21. Bolster noted the baggie had a imprinted picture of a "green goblin," that "green goblin" was a particular strain of marijuana, and that "that type of bag with that type of designation is typically always used to package some type of narcotic or drug." 2RP 223.

The State charged Miller with possession of methamphetamine, possession of less than 40 grams of marijuana, use of drug paraphernalia, third degree assault, second degree theft, and third degree theft. CP 6-8.¹

Miller testified Huxoll pulled in behind him as he let his dogs out of his truck. Huxoll told him to put the animals in the house, which he did. He went inside, used the bathroom, called his mother on the phone, and came back outside. 2RP 290-91. Huxoll was standing in the yard. Miller walked to his truck and closed the window. He locked the door and accidentally bumped Huxoll's outstretched arm as he tried to close it. Miller testified that Huxoll then "threw me on the ground and buried me in the grass." 2RP 290-91.

Miller said he did not use drugs. He did not recognize the glass tube, did not know it was in his truck, and did not know who put it there.

¹ The theft counts arose from an incident at a bank on July 5, 2010, about six weeks before the August 27, 2010, incident with Huxoll in front of Miller's house. CP 6-8. Miller pleaded guilty to third degree theft. CP 29-37; 1RP 1-7. The trial court granted the state's motion to dismiss the degree theft charge. 1RP 7

2RP 293-94. The same was true of the baggie. His former girlfriend, Rebecca Cook, as well as his son, had access to the truck at times before the incident. 2RP 294.

Cook testified she and Miller were together for four years before their relationship ended about one week before the incident. 2RP 244-45. She acknowledged she had used marijuana and methamphetamine and checked herself into a Seattle drug treatment facility after her relationship with Miller ended. 2RP 245-46. She did not want Miller to know about her drug use and never used in his presence. 2RP 246-48. According to her, Miller did not use drugs. 2RP 253.

Cook denied leaving the baggie in the truck and had never seen the glass tube in the vehicle. 2RP 249-51. Neither item belonged to her. 2RP 252-53. She said she had been in Miller's truck, but did not drive it because she had a suspended license. 2RP 249, 253-54.

Miller's son testified he worked with his father and had regular access to the truck around the time of the incident. 2RP 274-76. He said neither the baggie nor the glass pipe belonged to him. 2RP 276-77.

The jury found Miller guilty as charged. CP 71-73. The trial court sentenced Miller under the first-offender provision, RCW 9.94A.650. The court imposed concurrent 30-day jail terms for each count, and 12 months

community custody for the felonies of possession of methamphetamine and third degree assault. CP 81-86. The court also imposed several sentencing conditions. CP 84-86.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED MILLER'S CONSTITUTIONAL RIGHT TO ASSOCIATION BY PROHIBITING CONTACT WITH ALL PROBATIONERS AND PAROLEES DURING COMMUNITY CUSTODY.

Sentencing conditions that prohibit contact must be narrowly drawn. The trial court's sentencing condition prohibiting Miller from associating with "any individuals who are on prohibition or parole" is so broad as to infringe on his First Amendment right of association. This Court should order the condition stricken.

As a first offender, Miller qualified for imposition of community custody under RCW 9.94A.650(3).² For first offenders, a trial court may order any community custody condition included in RCW 9.94A.703, as well as payment of court-ordered legal financial obligations and performance of community restitution work. RCW 9.94A.650(4).

² RCW 9.94A.650 was amended effective June 15, 2011. Laws of 2011 1st Spec. Sess., ch. 40, § 9. The amendment does not affect Miller's argument.

Under RCW 703(3), a sentencing court has discretion to order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) *Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;*

(c) Participate in crime-related treatment or counseling services;

(d) Participate 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;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(emphasis added).

As one of Miller's conditions, the trial court prohibited association "with any individuals who are on probation or parole or any person his probation officer or the court specifically restricts him/her from associating with" CP 85 (condition 7). Miller acknowledges that as a restriction on contact with specified persons, this condition is statutorily authorized by RCW 9.94A.703(3)(b). See State v. Acevedo, 159 Wn.

App. 221, 233, 248 P.3d 526 (2010) (upholding same restriction against challenge that condition was not related to crime).³

Regardless, Washington courts take particular care when reviewing sentencing conditions that may affect fundamental constitutional rights such as the freedom of movement or association. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009); State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Because prohibiting contact implicates a person's constitutional rights to free speech and freedom of association, "Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime." Warren, 165 Wn.2d at 33.

A restriction on an offender's freedom of association need not be crime-related. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). The condition must, however, be reasonably necessary to foster the essential needs of the State and public order. See State v. Riley 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (prohibition on self-proclaimed

³ Acevedo argued only that the condition was not crime-related. He did not raise the constitutional challenge that Miller raises here. Acevedo is thus distinguishable and does not control here.

computer hacker convicted of computer trespass and possession of stolen access devices from associating with other computer hackers upheld; condition "helps prevent Riley from further criminal conduct for the duration of his sentence."); State v. Bobenhouse, 143 Wn. App. 315, 332, 177 P.3d 209 (2008) (domestic violence no-contact order prohibiting offender convicted of rape of a child and incest from contacting his children's former foster parents was reasonably necessary to protect foster parents from feared retribution and to maintain public order), aff'd. on other grounds, 166 Wn.2d 881 (2009); Malone v. United States, 502 F.2d 554, 556 (9th Cir. 1974) (sentence conditions prohibiting offender convicted of unlawfully exporting guns to United Kingdom from participating in American Irish Republic movement and having any contact with Irish organizations and Irish pubs were reasonably necessary to "the accomplishment of public order and safety" where "the crime stemmed from [offender's] high emotional involvement with Irish Republic sympathizers"), cert. denied, 419 U.S. 1124 (1975).

These cases illustrate that, although no-contact sentencing conditions need not be strictly crime-related, they must be narrowly drawn. State v. Riles offers another good example. The trial court there prohibited appellant Gholston from having unauthorized contact with

minors. The Supreme Court ruled that because the jury found Gholston raped a 19-year-old woman, the prohibition was an unauthorized infringement on his rights to free speech and freedom of association. Riles, 135 Wn.2d at 350. The Court held the statutory authority to order no contact with a "specified class of individuals" did not justify prohibiting Gholston from contacting minors where the victim was an adult. Id. at 352-53.

State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006) is consistent. There the court affirmed the condition that an offender convicted of methamphetamine possession refrain from associating with known drug offenders. The court reasoned "[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders." Hearn, 131 Wn. App. at 609; see Llamas-Villa, 67 Wn. App. at 456 (affirming condition forbidding association with individuals who use, possess, or deal controlled substances, concluding such was "conduct intrinsic to the crime for which Llamas was convicted," possession of cocaine with intent to deliver).

What these cases illustrate is that while no-contact sentencing conditions need not be strictly "crime-related," they must bear some reasonable relation to the general classification of criminal activity at issue

or class of individuals targeted and/or affected by the crimes(s). When they do not, they fail to promote public order and result in pointless infringement on an offender's right to freely associate.

The trial court's order prohibiting Miller from any contact with all probationers and parolees is so broad as to bear no reasonable relation to the goal of promoting safety and public order. The condition is, therefore, unconstitutional. "[A] criminal defendant always has standing to challenge his or her sentence on grounds of illegality." State v. Bahl, 164 Wn.2d 739, 750, 193 P.3d 678 (2008). Miller therefore appropriately challenges this condition now, for the first time on appeal.

For the reasons stated, Miller asks this Court to strike community custody condition (7).

2. THE TRIAL COURT'S FINDING THAT MILLER IS CHEMICALLY DEPENDENT LACKS EVIDENTIARY SUPPORT AND VIOLATES STATUTORY MANDATES.

The trial court found Miller "has a chemical dependency that has contributed to the offense." CP 76. This finding must be stricken.

First, the trial court's finding is unsupported by the evidence. "Chemical dependency" 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).⁴ There is no evidence Miller abused alcohol or was either addicted to or dependent on drugs or a "psychoactive chemical." Miller testified at trial he did not use drugs. His former girlfriend of four years did not know Miller to use drugs. Miller had no prior drug-related convictions or, for that matter, any felony convictions. The trial court sentenced him as a first offender, with no State opposition. 2RP 364-65. The court did not order a presentence investigation. 2RP 360. And neither Miller nor the State presented any evidence, such as a narcotics evaluation or the like, to suggest Miller suffered from a drug dependency.

A trial court may base its sentence only on evidence in the record. State v. Payne, 117 Wn. App. 99, 105, 69 P.3d 889 (2003), review denied, 150 Wn.2d 1028 (2004). Because there was no evidence of chemical dependency here, the trial court erred by entering the finding.

Second, the Legislature has specified a procedure by which a trial court may impose chemical dependency-related conditions:

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been

⁴ This definition applies in the criminal context. See RCW 9A.44.010(13) (Chemically dependent person "for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is 'chemically dependent' as defined in RCW 70.96A.020(4).").

convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony *where the court finds that the offender has a chemical dependency that has contributed to his or her offense. . . .*

RCW 9.94A.500(1) (emphasis added).⁵

Despite the requirement of a "chemical dependency screening report," no such report was mentioned during the sentencing hearing and none was filed. And the court specifically did not order a presentence investigation. 2RP 360.

On Miller's judgment and sentence, the trial court placed a check mark next to the preprinted entry that states, "The court finds that the defendant has a chemical dependency that has contributed to the offense(s). RCW _____." CP 76. The court neither specified the appropriate statute upon which it relied nor cited to the evidence that supported the finding.

Because the court failed to follow statutory requirements, the chemical dependency finding must be stricken. See State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003) (because trial court did not obtain

⁵ In State v. Hunley, 161 Wn. App. 919, 929, 253 P.3d 448 (2011), the court found RCW 9.94A.500 unconstitutional for reasons not pertinent here. A petition for review has been filed in Hunley. Supreme Court No. 86135-8.

or consider a presentence report or mental status evaluation, or find Jones was a person whose mental illness had contributed to his crimes, as required by former RCW 9.94A.505(9), court's condition relating to mental health treatment ordered stricken).

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

The trial court ordered Miller to cooperate in an HIV test under RCW 70.24.340. CP 82; 2RP 370. RCW 70.24.340(1) mandates HIV testing for offenders convicted of (1) a sex offense under chapter 9A.44 RCW; (2) prostitution or offenses relating to prostitution under chapter 9A.88 RCW; or (3) "drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles."

Miller was convicted of three chapter 69.50 RCW crimes. They are methamphetamine possession under RCW 69.50.4013, marijuana possession under RCW 69.50.4014, and use of drug paraphernalia under RCW 69.50.412.

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. Furthermore, the definition of "drug

paraphernalia includes "all equipment, products, and materials of any kind which are used, intended for use, or designed for use in . . . injecting . . . into the human body a controlled substance." RCW 69.50.102(a). specifically listed are hypodermic syringes and needles. RCW 69.50.102(a)(11).

The trial court did not, however, make the required finding that Miller's offenses were associated with the use of needles. Nor was there evidence to support such a determination. The court therefore erred in ordering the HIV test. This obligation should be stricken.

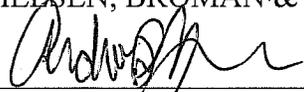
D. CONCLUSION

The trial court erred by imposing sentencing conditions that violated Miller's constitutional rights, were not supported by the evidence, or exceeded the court's statutory sentencing authority. This Court should strike the conditions.

DATED this 31 day of August, 2011.

Respectfully submitted,

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State v. William D. Miller

No. 29767-5-III

Certificate of Service by email

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 31st day of August, 2011, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per GR30(a)(4):

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Signed in Seattle, Washington this 31st day of August 2011

X Patrick Mayovsky

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

STATE OF WASHINGTON/DSHS,)	
)	
Respondent,)	
)	
v.)	COA NO. 29767-5-III
)	
WILLIAM MILLER,)	
)	
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 31ST DAY OF AUGUST, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM MILLER
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST, 2011.

x Patrick Mayovsky

SEP 01 2011

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JARED B. STEEDState v. William D. MillerNo. 29767-5-IIICertificate of Service by email

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 31st day of August, 2011, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Teresa Chen
Attorney at Law
tchen@wapa-sep.wa.gov**Signed** in Seattle, Washington this 31st day of August 2011x *Patrick Mayovsky*