

29767-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Oct 31, 2011
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

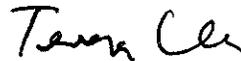
WILLIAM D. MILLER,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentence of the Appellant.

III. ISSUES

1. Does a community custody condition restricting the Defendant's association with other parolees violate his right to association?
2. Where the Defendant was convicted of three VUCSA offenses and there is evidence in the record of his possession of two types of illegal substances in two locations together with at least four pipes and digital scales, is the sentencing court's finding of the Defendant's chemical dependency supported in the record?
3. Did the sentencing court abuse its discretion in ordering HIV testing after a conviction of possession of methamphetamine?

IV. STATEMENT OF THE CASE

By combination of jury verdict and guilty plea, the Defendant William D. Miller was found guilty of possessing methamphetamine and

marijuana (under 40 grams), use of drug paraphernalia, assault in the third degree, and theft in the third degree. CP 29-37, 74-87; RP 356-57. He appeals from his sentence. The Statement of the Case intends to supplement and not repeat those facts provided in the Appellant's Statement.

Walla Walla police officer Kevin Huxoll went to the Defendant's home to arrest him on suspicion of felony theft. RP 114-15, 128. When the officer attempted to arrest the Defendant, the Defendant had just arrived home. RP 114-17. The Defendant disobeyed the officer and went into his house. RP 118-19. At trial, the Defendant admitted that the officer told him not to enter the house, but that he did so anyway, because he had not yet been told that he was under arrest and because he wanted to make a phone call in order to create a witness to the interaction. RP 295-96.

When the Defendant exited his truck, he had left the door ajar. RP 132. When he exited the house a few minutes later, the Defendant was talking on a cordless phone. RP 120, 296. He expressed his intent to shut the door and lock his truck. RP 123. So intent was he on sealing his truck that he disobeyed the officer's direction a second time. RP 120. Officer Huxoll testified that he is 6'3", 230 pounds, and fit. RP 122. He was wearing body armor and a gun belt. RP 125. The Defendant was undeterred and walked directly to his truck, where he attempted to seal it by closing windows and

forcing the door closed to the point of assaulting the officer. RP 120-25, 127, 195-96, 291.

The whole time, he remained on the phone, ostensibly telling his mother that “they” were arresting and assaulting him as he crushed first the officer’s body and then the officer’s arm with the truck door. RP 123-26, 132-35, 264, 291. At the time, Officer Huxoll was the only officer on the scene. Officer Matthew James Greenland arrived only after the assault and approached only after Officer Huxoll had taken the Defendant to the ground. RP 125-26, 258, 262.

The Defendant’s resistive and furtive behavior gave Office Huxoll reasonable suspicion to call for a canine to sniff the Defendant’s truck. RP 129, 163. The officer believed that the Defendant was trying to hide something in his truck. RP 163. And, in fact, drugs were discovered inside the truck. RP 167-70.

Subsequent to the arrest, the police searched the Defendant’s home where they found brass knuckles, two water smoking pipes, a third pipe shaped like a female form, a wooden smoking kit, more marijuana, and digital scales. CP 4. Also subsequent to the arrest, the Defendant’s girlfriend got a restraining order against him. CP 104-07; RP 251.

V. ARGUMENT

A. THE STANDARD COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH OTHER PROBATIONERS DOES NOT VIOLATE THE DEFENDANT'S FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION.

The Defendant complains that the community custody condition that he “not associate with any other individuals who are on probation or parole” (CP 85) violates his First Amendment right of association. Brief of Appellant at 7. An issue of constitutional magnitude may be raised for the first time on appeal. *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006).

The Defendant acknowledges that there is statutory authority for the community custody condition. Brief of Appellant at 8, *citing* RCW 9.94A.703(3)(b). *See also* RCW 9.94A.505(8). He acknowledges that a restriction on an offender's freedom of association need not be crime-related (Brief of Appellant at 9, *citing State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992)), but need only be **reasonably necessary to foster the essential needs of the State and public order** (Brief of Appellant at 9, *citing State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)). However, the Defendant argues that the particular prohibition does not bear a reasonable relation to the general classification of criminal activity for which he has been convicted and, therefore, fails to promote public order. Brief of

Appellant at 11-12.

The Defendant's status as a convicted felon, provides constitutional justification for imposing reasonable restrictions upon association. *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993); *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998); *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992). A sentencing court may restrict an offender's contact with a class of individuals who engage in behavior similar to his crime. *State v. Riley*, 121 Wn.2d at 29 (upholding a condition restricting a computer hacker from associating with other hackers); *State v. Llamas-Villa*, *supra* (upholding a condition prohibiting a drug user from associating with other drug users).

The Constitution does not recognize a generalized right of "social association." *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989). It does, however, protect two rights of association: "expressive association" and "intimate association." *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

"Expressive association" stems from the First Amendment, which is cited by the Defendant here. This type of associational freedom protects the right of individuals to associate for purposes of engaging in activities protected by the First Amendment such as speech, assembly, exercise of

religion, or petitioning for redress of grievances. *Roberts v. United States Jaycees*, 104 S. Ct. at 3252.

The right of “intimate association” lies most strongly in the Fourteenth Amendment.¹ See e.g. *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993); *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1192-93 (9th Cir. 1988). The right guarantees an individual the choice of entering an intimate relationship free from undue intrusion by the state. Generally, it regards relationships which create or sustain a family, such as marriage, childbirth, the raising and educating of children, and cohabitation with relatives. *Roberts v. United States Jaycees*, 104 S. Ct. at 3250-51. The right does not extend to business relationships,² chance encounters in dance halls,³ short term encounters in motel rooms,⁴ the relationship between an escort and client,⁵ the relationship between a coach and players,⁶ or friendships.⁷

¹ There is some dispute regarding whether the right to intimate association contains a First Amendment component. This dispute arises from dicta in a number of Supreme Court decisions. The first Supreme Court case to recognize the right to intimate association, however, cited only substantive due process cases. See generally, Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & LAW 231, 233-43 (spring 1998). The only Washington case to deal with the right to intimate association indicates that the right stems from the right to privacy and “extends only so far as the principles of substantive due process permit.” *Bedford v. Sugarman*, 112 Wn.2d 500, 516-17, 772 P.2d 486 (1989).

² *Roberts v. United States Jaycees*, 104 S. Ct. at 3251

³ *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

⁴ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 602 (1990).

⁵ *IDK, Inc. v. County of Clark*, 836 F.2d at 1193.

⁶ *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1051-52 (5th Cir. 1996).

⁷ *Rode v. Dellarciprete*, 845 F.2d 1195, 1204-05 (3d Cir. 1988) (plaintiff’s association

An incarcerated person loses many of the liberties and privileges enjoyed by other citizens; foremost among these is freedom of association. *Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162, 2167, 156 L.Ed.2d 162 (2003). These restrictions bear a rational relationship to legitimate penal interests. *Overton v. Bazzetta*, 539 U.S. at 131-32. Similarly, the prohibition regarding associating with other parolees bears a rational relationship to a legitimate community custody interest.

Discouraging further criminal conduct is a goal of community custody. *State v. Hearn*, 131 Wn. App. 608-09. It is logical that limiting the Defendant's contact with other lawbreakers will discourage his further criminal conduct.

The Ninth Circuit has upheld the probation condition against associating with known members of any criminal street gang (*United States v. Soltero*, 510 F.3d 858 (9th Cir. 2007)) or neo-Nazi/white supremacist groups (*United States v. Ross*, 476 F.3d 719 (9th Cir. 2007)). The court held that the prohibitions were reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation. *United States v. Soltero*, 510 F.3d at 866; *United States v. Ross*, 476 F.3d at 722.

Similarly, this Court has upheld a probation condition prohibiting

with her brother-in-law who was also her "good friend" was not the sort afforded special

association with known drug offenders. *State v. Hearn*, 131 Wn. App. 601. A crime-related restriction that is reasonably necessary to accomplish the essential needs of the state and public order will only be reversed if it is manifestly unreasonable. *State v. Hearn*, 131 Wn. App. at 607-08.

The Defendant's particular criminal conduct is extremely varied and suggestive of a very general disregard for the law. Upon noticing that the ATM tended to withhold bankcards, the Defendant waited for the next person and then immediately returned to take advantage of the situation. CP 1-5. He showed no respect for the officer's authority. He made the very unwise choice to assault a large and armed officer. The Defendant violated his conditions of release in order to stalk his former girlfriend while she was in treatment. CP 104-07. His actions resulted in a restraining order even while this case was pending. The Defendant's offenses were opportunistic, not merely drug-related.

Although he had no previous scorable criminal history (CP 76), the Defendant's behavior demonstrated special criminal legal knowledge. He knew that he could ignore the officer's order up until the point of arrest. RP 295-96. He decided to call someone on the cordless phone to create a sympathetic witness for himself. RP 295-96. He attempted to manufacture

constitutional protections).

false excited utterances by telling the person on the phone that “they” were assaulting him even as he was the one assaulting the police officer. RP 123-26. He attempted to prevent the discovery of illegal substances in his truck incident to arrest by sealing the truck prior to his arrest. All this suggests that the Defendant has special knowledge either due to his own experiences or, more likely, the shared experiences of other criminals.

He would be well served, as would the community, if he avoided the company of others who have little respect for the rights of others and for the authority of police officers.

A trial court’s ruling on a crime-related prohibition is reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d at 37. The trial court’s order is reasonable and understandable. Limiting the Defendant’s association with other convicted criminals is a reasonable part of his rehabilitation. There is no abuse of discretion.

B. THE COURT’S FINDING OF CHEMICAL DEPENDENCY IS SUPPORTED IN THE RECORD.

The court found the Defendant to be chemically dependent and ordered treatment. CP 76, 85. The Defendant challenges the sufficiency of the evidence for the court’s finding that he is a chemically dependent person.

The evidence of his chemical dependency is more than sufficient.

The Defendant possessed methamphetamine, marijuana, four drug pipes, and a digital scale. His refusal to acknowledge use in the face of this evidence only evidences his denial of the problem.

The Defendant argues that unless the department completed a chemical dependency screening before the sentence, no treatment may be ordered. Brief of Appellant at 14-15, *citing* RCW 9.94A.500 and *State v. Jones*, 118 Wn. App. 199, 209, 7 P.3d 258 (2003). Neither authority mandates this result.

The statute indicates that court shall order the department to complete a chemical dependency screening *or* the court may waive the screening. RCW 9.94A.500. The statute does not state that absent a screening, no treatment may be ordered.

The *State v. Jones* case references statutory language no longer present in any statute. The *Jones* court states: “Since 1998, a portion of the SRA that is presently codified as RCW 9.94A.505(9) has provided that a trial court may order mental health treatment as a condition of community placement, which includes community custody, only if it complies with the following procedures.” *State v. Jones*, 118 Wn. App. at 209. This language is not part of RCW 9.94A.500, .505, or .703. The current statutes do not contain any such “only if” language.

Instead, the existing law explicitly permits the court to order as part of the terms of community custody that the defendant participate in crime-related treatment or counseling services. RCW 9.94A.703(3)(c). *See also* RCW 9.94A.703(3)(d) (granting a sentencing court the authority to order an offender to “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”).

In a sentence for three VUCSA convictions, the court made no error in finding chemical dependency and ordering an evaluation and treatment.

C. THE COURT WAS AUTHORIZED TO ORDER THE HIV TESTING AS A CONDITION OF COMMUNITY CUSTODY.

The Defendant challenges the community custody condition that he cooperate with HIV testing. CP 82.

The court has discretion to require that an offender “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.” RCW 9.94A.703(3)(d). HIV testing fits in this category. It is reasonably related to the offense. The Defendant was using methamphetamine, which may be ingested intravenously. The Defendant’s home and car were littered with drug paraphernalia and at least

four pipes, suggesting that he did not use alone, but with others. If the Defendant were infected and unaware, his untreated illness could weaken him so as to hinder his progress in treatment. If the Defendant were infected, unaware of his condition, untreated, and continuing to abuse drugs, he could infect others. This would be a public health concern. Testing promotes the safety of the community.

The Defendant notes that RCW 70.24.340 states that “local health departments ... shall conduct ... HIV testing ... of all persons ... convicted of 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.” RCW 70.24.340(1)(c). He suggests that absent evidence of hypodermic needle use, the *court* has no authority to order testing. But this is not the language of the statute. The statute is directed at the Department of Health. RCW 70.24.340 authorizes the Department of Health to test all convicted persons if the conviction is a drug offense associated with the use of hypodermic needles. The *Department* is authorized under this statute, regardless of any court order. RCW 9.94A.703 is the statute which authorizes the court.

The court made no error in ordering HIV testing.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's convictions and sentence.

DATED: October 31, 2011.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

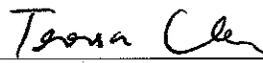
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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|----------------------|---|------------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | No. 29767-5-III |
| |) | |
| v. |) | DECLARATION OF MAILING |
| |) | |
| WILLIAM DEAN MILLER, |) | |
| |) | |
| Appellant. |) | |
| |) | |

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day, October 31, 2011, I served the Appellant and his attorney of record with a Respondent's Brief in the above entitled matter. The Appellant (William Dean Miller, 1540 J Street, Walla Walla, WA 99362) was served via a properly stamped and addressed envelope deposited in the mails of the United States of America. The attorney was electronically served (Andrew P. Zinner <ZinnerA@nwattorney.net>) Brief via this Court's e-service and by prior agreement under GR 30(b)(4).

DATED: October 31, 2011.



Teresa Chen

DECLARATION OF MAILING