

**FILED**

NOV 14 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 30050-1-III**

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

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**State of Washington,  
*Respondent***

v.

**Carl J. Price,  
*Appellant***

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Appeal from the Superior Court of Grant County

---

*BRIEF OF APPELLANT*

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Attorney for Appellant Carl J. Price:  
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## **I. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS**

1. The Superior Court applied RCW 9.94A.709 in violation of double jeopardy and ex post facto protections under state and federal constitutions.
2. The Superior Court improperly imposed conditions of community custody without requiring proper due process protections before imposing a condition under RCW 9.94A.709.

## **II. STATEMENT OF THE CASE**

On August 24, 2004 Carl J. Price was charged by information in Grant County Superior Court with Child Molestation in the First Degree alleged between November 2003 and January 2004 pursuant to RCW 9A.44.083. On November 20, 2004 Mr. Carl J. Price entered a plea to “Child Molestation First Degree” before the Honorable Ken Jorgenson. The Judgment and Sentence issued on December 20, 2004 ordered 68 months under sentence page 6 of 15 and there was no order of confinement to DOC pursuant to RCW 9.94A.712. (CP 16-30) The sentence was pursuant to Special Sexual Offender Sentence Alternative RCW 9.94A.670. The defendant and the state both received notice on page 8 of 15 of the Judgment and Sentence of the length of supervision for 10 years from the release from confinement “to assure payment of all legal financial obligations.” (CP 16-30 p. 8) The court imposed no period of community custody pursuant to RCW 9.94A.712. (CP 16-30)

In March, 2011 the government sought to extend Mr. Carl J. Price’s conditions of supervision based upon RCW 9.94A.712. (CP 41-42) The basis of

this request was two DOC reports dated February 28, 2011 (CP 40) and May 24, 2011 (CP 65-67). The defendant appeared on May 6, 2011 and opposed the “extension of the conditions.” (CP 43-64) A continued hearing was held before the Honorable Evan Sperline on May 27, 2011 at which time the court extended a condition of release that Mr. Carl J. Price was to have “absolutely no contact with any child under the age of 18 years, except in the company of a responsible and informed adult.”

The defendant timely filed this appeal to Division III Court of Appeals.

### **III. INTRODUCTION**

On August 25, 2004 Carl J. Price was charged by information in Grant County Superior Court with Child Molestation in the First Degree alleged between November 2003 and January 2004 pursuant to RCW 9A.44.083. On November 20, 2004 Mr. Carl J. Price entered a plea to “Child Molestation First Degree” before the Honorable Ken Jorgenson. The Judgment and Sentence issued on December 20, 2004 ordered 68 months under a sentence on page 6 of 15 and there was no order of confinement to DOC pursuant to RCW 9.94A.712. (CP 16-30) The sentence was pursuant to Special Sexual Offender Sentence Alternative RCW 9.94A.670. The defendant and the state both received notice on page 8 of 15 of the Judgment and Sentence that the length of supervision for 10 years from release from confinement was “to assure payment of all legal financial

obligations.” (CP 16-30 p. 8) The court imposed no period of community custody pursuant to RCW 9.94A.712. (CP 16-30)

Subsequently, Mr. Price appeared before the Honorable Judge Evan Spurline for violations of conditions of SOSSA and the court entered findings and no further conditions were imposed. The court entered a written order with no further conditions ordered on Mr. Carl J. Price. (CP 36-38) No appeal was filed by either party from any of these orders.

On March 22, 2011 the government sought to extend supervision of Mr. Carl James Price pursuant to RCW 9.94A.712. (May 06, 2011 RP 1-3) (CP 41-42) The request was made based upon a Department of Corrections report from Abel Andrade, Community Corrections Officer, dated February 28, 2011. (CP 40) The defendant opposed the request of the prosecution and the Department of Corrections based on an additional report dated May 24, 2011 (CP 65-67) from Tim Logan, Community Corrections Officer, requesting the extension of conditions pursuant to RCW 9.94A.709. Briefing was filed opposing the motion brought by the government arguing that due process standards must be met before the imposition of conditions under RCW 9.94A.709. Additionally, that the court could not extend conditions of supervision beyond those ordered by the sentencing court in the original Judgment and Sentence. (CP 43-64)

On May 6, 2011 Carl J. Price appeared before Judge Evan Spurline and the government was seeking to extend conditions of supervision pursuant to RCW

9.94A.712. (May 6, 2011 RP) The defense prepared a brief which was provided to the court at the hearing opposing the extension. (May 6, 2011 RP p.8) (CP 43-64) The defense maintained that the community custody was imposed for only sixty eight months and not for lifetime under RCW 9.94A.712. The court advises the prosecution of multiple issues including that the sentencing court imposed no community custody pursuant to 712. (May 6, 2011 RP 6-10) The court then continued that matter until May 27, 2011 at 1:30 with the state instructed to specify the factual basis by May 17, 2011. (May 6, 2011 RP p. 10-11)

A hearing was held on May 27, 2011 before the Honorable Evan Sperline with Douglas Mitchell appearing on behalf of the State of Washington. Douglas Phelps appeared on behalf of the defendant, Carl J. Price. During the hearing the prosecution conceded that the Judgment and Sentence could not be amended nunc pro tunc to extend community custody. (May 27, 2011 RP 4) The government believed that *State v. Ramon Flores Murillo*, 134 Wn. App. 521 (2006) would not allow the state to seek extension of community custody pursuant to RCW 9.94A.712 now 9.94A.507. (May 27, 2011 RP 4-5) The prosecution maintained that they could seek to “extend community custody” under 9.94A.709. (May 27, 2011 RP 4 & 6)

The court ruled that the sentencing judge had sentenced Mr. Carl J. Price to 68 months of community custody. (May 27, 2011 RP 7-8) The state was no longer seeking a lifetime period of community custody based upon the prior

sentence. (May 27, 2011 RP 9) The Department of Corrections maintained a request extending certain conditions beyond the end of supervision. A report was filed on May 24 by Mr. Logan asking that conditions be extended requiring Mr. Price not “possess or use pornography, not have contact with children under the age of 18 years except in the company of responsible adult, and not consume or possess alcohol.” (May 27, 2011 RP 9) (CP 65-67) The court indicates that imposition of these conditions would be subject to contempt of court proceedings for violations. (May 27, 2011 RP 10)

After setting this record the court allowed the prosecution to proceed with its presentation of the case. (May 27, 2011 RP 10) The prosecutor argued that although the court only imposed a sentence of 68 months the legislative intent allowed a sentence of up to life. The report from the Department of Corrections and community safety would be “positively affected” by extension of the conditions. (May 27, 2011 RP 11) The prosecution argued that Mr. Prices’ history justified the imposition of the conditions request by the Department of Corrections.

The defendant provided the court with a “Supplemental Brief in Opposition to the Order Extending Conditions and Supporting Termination of the SSOSA.” (May 27, 2011 RP 12, CP 70-75) It was then argued that the extension of the conditions violated *ex post facto* protections and double jeopardy prohibitions. (May 27, 2011 RP 14-15) The defense argued that as the court never

imposed lifetime conditions but only 68 months and the court could not now “extend” conditions. (May 27, 2011 RP 17) Additionally, that because the court never imposed lifetime community custody the court is unable to “extend community custody”. (May 27, 2011 RP 17)

The court acknowledged that in every “709 case” there will be a difference between the periods imposed by the court at sentencing. (May 27, 2011 RP 17) The court then adds that the punishment can only be by contempt of court. The court acknowledged that the risk of violation comes from a violation of the initial crime. (May 27, 2011 RP 18) The sentencing court never advised the defendant by the Judgment and Sentence that he was at risk of conditions of community custody beyond 68 months. (May 27, 2011 RP 19)

The defense argued that the court had no authority to “extend a period of probation” beyond a period of probation imposed in a judgment and sentence. (May 27, 2011 RP 22) In argument the defense maintains that the legislative action violated the separation of power because the legislature is extending jurisdiction rather than the court. (May 27, 2011 RP 23) The sentencing court never imposed any lifetime period of community custody only 68 months. (May 27, 2011 RP 23)

The court acknowledged the *ex post facto* argument and that “709” was adopted in 2008 well after Mr. Price was sentenced. (May 27, 2011 RP 23-25) The court makes it clear that the Judgment and Sentence was 68 months without

any amendments or appeal of the sentence by either party. The court recognizes the double jeopardy and ex post facto argument but has been unable to resolve. (May 27, 2011 RP 28) The court then imposed a condition for life that Mr. Price “have no contact with minors except in the company of a responsible adult.” (May 27, 2011 RP 30) The court then amended that order adding language of “and informed” adult. (May 27, 2011 RP 30) (CP 76) There was no evidence presented and no testimony or cross examination of witnesses. The court allowed the imposition under “709” based on the minimal representations of the DOC reports.

#### **IV. ARGUMENT**

Mr. Carl J. Price was sentenced by the trial court to a Special Sexual Offender Sentence Alternative pursuant to RCW 9.94A.670 for Child Molestation in the First Degree, alleged between November 2003 to January 2004. Mr. Carl Price was sentenced to 68 months under a sentence on page 6 of 15 there was no order of confinement to DOC pursuant to RCW 9.94A.712. (CP 16-30) The court imposed a period of supervision for 10 years from release from confinement to “assure payment of all legal financial obligations.” (CP 16-30)

RCW 9.94A.709 effective date 2008 allows:

- (1) “At any time prior to the completion or termination of a sex offender’s term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions of

community custody for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody.

- (2) If a violation of a condition extended under this section occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040
- (3) If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.”

RCW 7.21.040 [Punitive Sanctions-Fines]

- (1) “Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.
- (2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

- (b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.
- (c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which the contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.
- (d)(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment for up to three hundred sixty-four days, or both.”

**Issue 1: The Superior Court applied RCW 9.94A.709 in violation of double jeopardy and ex post facto protections under state and federal constitutions.**

The government initially sought to extend Carl J. Price’s community custody pursuant to RCW 9.94A.712. (May 06, 2011 RP 1-3) (CP 41-42) The court then sua sponte pointed out that Mr. Carl J. Price was never sentenced to any period of community custody under 712 but only to sixty-eight months. (May

06, 2011 RP 1-3) Additionally, the court articulates that he has no evidence as to why he should extend the conditions other than DOC says it is a “good idea”.

(May 06, 2011 RP 2) The defense presented a brief in opposition to the governments request to “extend the conditions” which the court accepted. (May 06, 2011 RP 5) Ultimately, the court continued the motion until May 27, 2011 at 1:30pm. (May 06, 2011 RP 8)

The court ordered the modification of a judgment and sentence almost seven years after the entry of the judgment and sentence. The defendant objected to the court modifying the judgment and sentence by “extending community custody”. The defendant in a written brief argued that such an act violated due process rights under the U.S. Constitution and Article I § 22 of the Washington Constitution. Additionally, the defendant argued that it violates the defendant’s right to a final judgment and double jeopardy. (CP 43-64)

The Judgment and Sentence entered by the Honorable Ken Jurgenson clearly states that the defendant was placed on community custody under the charge of DOC for the length of the suspended sentence, the length of the maximum term of the sentence under RCW 9.94A.712 or three years, whichever is greater. The sixty-eight months of supervision would have expired prior to the hearing on May 27, 2011 by any calculation. Nevertheless, the court imposed an extension of the conditions of community custody. (CP 76) The Judgment and

Sentence also sets out the rights to appeal which must be filed within 30 days or within one year for collateral attack. (CP 16-30)

In determining if a statute involves a violation of double jeopardy and ex post facto concerns the court must first determine if the law is civil or criminal in nature. *In re Young*, 122 Wn.2d 1, 18, 857 P.2d 989 (Wash. 1993) The determination of a particular statute as civil or criminal is largely a matter of statutory construction. *In re Young*, supra 18 citing *Allen v. Illinois*, 478 U.S. 364, 368, 106 S. Ct. 2988, 2991, 92 L.Ed.2d 296 (1986); *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641, 65 L.Ed.2d 742 (1980)

A two part analysis occurs: First, did the legislature in establishing the act indicate either expressly or impliedly a preference for criminal over civil label. Second, if the legislature indicates an intention to establish a civil penalty, then a further inquiry to determine if the statutory scheme is so punitive either in purpose or effect as to negate that intention. *State v. Catlett*, 133 Wash.2d 355, 365-366, 945 P.2d 700 (1997); *In re Young*, supra 18 citing *United States v. Ward*, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 2641 (1980)

The court looks at the language of the statute and the legislative history before looking at an analysis of the purpose and effect of the statutory scheme. *In re Young*, supra 19 A review of the language of RCW 9.94A.709 establishes a criminal purpose of the statute. In paragraph (1) the language reads: “if the court finds that public safety would be enhanced” which suggests a punitive basis rather

than any type of rehabilitative purpose. Next, the statute at RCW 9.94A.709(1) may be applied “regardless of the expiration of the offender’s term of community custody.” RCW 9.94A.631(2) sets out that “a violation of a condition extended under this section occurs after the expiration of the offender’s term of community custody, it shall be deemed a violation of the sentence for the purpose of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040.” This section of the law refers to the offense committed in the earlier sentence and calls for punishment as contempt of court.

A review of RCW 7.21.040 is entitled “Punitive Sanctions-Fines” once more there is a clear reference to punishments for “contempt of court”. Then in section (2)(a) the statute reads “a punitive sanction for contempt of court.....and reciting the punitive sanction sought to be imposed.” Then in RCW 7.21.040(2)(d) the statute allows for the imposition of “fine of not more than five thousand dollars or imprisonment for up to three hundred sixty-four days or both.” A penalty matching that of a gross misdemeanor or sentence allowed for crimes under RCW 9.92.020 “up to three hundred sixty-four days, or by a fine in an amount filed by the court of not more than five thousand dollars.”

The legislature in establishing RCW 9.94A.631, RCW 9.94A.709, and RCW 7.21.040, both expressly and impliedly established a criminal statute. Beyond the express and implied purposes the statute here is so punitive in purpose or effect to effectively negate any civil purpose the statute may have.

It is important that the court should consider factors set forth by the U.S. Supreme Court and cited in *Young* supra 21 (1993) citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L.Ed.2d 644 (1963):

“Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned...”

An application of these criteria to RCW 9.94A.709 incarceration of 364 and fines of up to five thousand is historically the punishment Washington Courts may impose for a gross misdemeanor. As stated the same punishment is available to courts for gross misdemeanor convictions pursuant to RCW 9.92.020. The punishment will occur only after there is a charging and a court hearing to establish the violation of the “courts order”. RCW 7.21.040(2) requiring a finding of scienter before the punishment may be imposed. The imposition of fines and a jail sentence is traditionally imposed as punishment, retribution, and deterrence for gross misdemeanor crimes. The legislature has specified the same potential punishment used for gross misdemeanor charges this is indicative that the statute is criminal in purpose.

Another consideration is that “being in the presence of a minor child without an informed adult present” is not a criminal offense without the application of RCW 9.94A.709. Allowing the imposition of incarceration for merely not informing someone of your prior offense or being with a minor child would be excessive were there any reason for the sentence other than a criminal punishment. In applying the factors to the statute RCW 9.94A.709 and 7.21.040 these statutes are criminal rather than civil in their purpose. The court then should hold that the imposition of this statute violates ex-post facto standards protections based upon the express and implied purpose as well as the factors established by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L.Ed. 26 644 (1963).

In looking at the question of a double jeopardy violation of constitutional protections the Fifth Amendment to the federal constitution and Article I § 9 are applied equally. *State v. Unga*, 165 Wash.2d 95, 196 P.3d 645 (2008) The Fifth Amendment to the federal constitution and Article I § 9 of the Washington Constitution provide a prohibition against double jeopardy that protects a defendant from multiple punishments for the same offense. *State v. McClendon*, 131 Wash.2d 853, 862, 935 P.2d 1334 (1997) (citing *United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L.Ed.487 (1989), abrogated on other grounds by *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L.Ed.2d 450 (1997)) Washington Supreme Court employs a two-part test to determine whether a

government action is punitive. *State v. Catlett*, 133 Wash.2d 355, 366, 945 P.2d 700 (1997) In Washington, we first look to the express or implied intent of the government sanction. *Id* at 365, 945 P.2d 700 If the statutes intent is not punitive, then the analysis turns on whether the sanction’s purpose or effect, nevertheless, is so punitive as to negate that intent. *Id.*; see also *McClendon*, 131 Wash.2d at 870, 935 P.2d 1334 (Talmadge J., concurring)

This analysis was made in looking at the question of the proper application of the ex post facto protections. The language of RCW 9.94A.631, RCW 9.94A.709, and RCW 7.21.040 both explicitly and impliedly establish a punitive purpose for the statute. Additionally, the statute’s sanctions a purpose and effect which are so punitive as to negate any intent to establish civil penalties. As the statute is criminal rather than civil double jeopardy protections warrant a finding that RCW 9.94A.709 and RCW 7.21.040 violate double jeopardy protections.

**Issue 2: The Superior Court improperly imposed conditions of community custody without requiring proper due process protections before imposing a condition under RCW 9.94A.709.**

The court found that it could “extend the conditions of community custody” but the court did not advise what legal standard it applied in making its decision. The courts decision occurred in granting the states motion. (May 27, 2011 RP 28-30) In entering the order the court makes the statement: “But Mr. Price could not abide by the condition that he have no contact with a child, except in the company of a responsible adult, and still commit a crime.” There is not a

statement of the standard the court applied in arriving at its decision to extend the condition. RCW 9.94A.709 does not establish a standard for the court to use, other than, “if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions of community custody.”

At the initial setting of the governments motion on May 6, 2011 a brief was presented (CP 43-64) raising due process issues in the “extension of community custody.” In the briefing the defense argued that the due process standards protections including: “(a) written notice of the claimed violation of parole, (b) disclosure of evidence against him, (c) opportunity to be heard in person and present evidence, (d) a right to cross-examine witnesses, (e) neutral and detached magistrate, (f) written statement of fact finder of evidence relied upon and reasons for the fact finders decision.” *Morrisey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L.Ed.2d 284 (1972); *In re Pers. Restraint of McNeal*, 9 Wash 617, 630, 994 P.2d 890 (2000) (CP 43-46) The Washington Supreme Court has acknowledged the due process requirements in probation hearings in *State v. Dahl*, 139 Wash 2d 678, 990 P.2d 396 (1999); *State v. Abd-Rahmaan*, 154 Wash.2d 280, 111 P.3d 1157 (2005)

The court sua sponte advises the government of the need to specify the facts they are relying on. (May 6, 2011 RP 7 lines 15-23) Then at the continuing hearing conducted on May 27, 2011 took no evidence. The defense filed a

supplemental brief in opposition to the extension. (CP 70-75) The court took no testimony and provides no statement of the evidence considered in arriving at the courts decision. (May 27, 2011 RP 9-30) (CP 76)

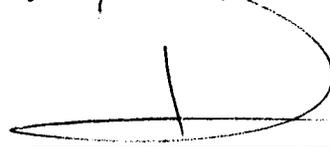
The court never required any written notice of the basis for the extension of the community custody or the disclosure of the evidence used against Mr. Price. The defense filed two written briefs that request due process consistent with *State v. Dahl*, 139 Wash.2d 678, 990 P.2d 396 (1999). The state relied entirely on two reports from the Department of Corrections. (CP 65-67, 41-42) The court took no testimony or any cross-examination of those making reports to the court. (May 27, 2011 RP 9-30) The courts order fails to provide the written statement from the fact finder of the evidence relied upon or the reasons for the fact finders decision. (CP 76)

Ultimately, the statute RCW 9.94A.709 and RCW 7.21.040 does not establish any standard which the court is to apply in the extension of community custody. The defense sought the minimal due process requirements required under community custody hearings. The court failed to provide even this minimal level of protection. The defendant therefore seeks remand for a proper hearing with the due process protections required under *Morrissey*, supra.

## **V. CONCLUSION**

The legislature in passing RCW 9.94A.709 and RCW 7.21.040 has created a criminal statute which violates ex-post facto and double jeopardy protections. The court denied Mr. Price basic due process protections by imposing an extension of community custody conditions without a proper hearing. The defense request that the case be remanded with instruction to reverse the Superior Courts order extending the conditions of community custody.

Respectfully submitted this 14 day of ~~November~~, 2011

A handwritten signature in black ink, appearing to be 'D. Phelps', written over a horizontal line.

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