

FILED
September 26, 2012

NO. 30601-1-III
Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

DUANE R. ABEL,

Appellant.

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

The Honorable John W. Lohrmann, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred by imposing conditions of community custody that were not authorized by statute, were not crime-related, and/or were void for vagueness.

Issue Pertaining to Assignment of Error

Did the trial court exceed its statutory sentencing authority by prohibiting Duane R. Abel from possessing alcohol or using or possessing "pornographic material or equipment of any kind[,]" as well as ordering affirmative conduct, that bore no relation to the crime?

B. STATEMENT OF THE CASE

On December 8, 2010, the State charged Duane R. Abel with two counts of first degree child rape, alleging Abel committed the crimes between June 1, 2007 and September 17, 2007. CP 6-8. After the State amended the information to charge one count of first degree child molestation, Abel pleaded guilty. CP 10-22; RP 1-8.

With an offender score of 6, Abel's minimum standard range was 98 months to 130 months, with a maximum term of life. The trial court rejected the prosecutor's recommended 98-month standard range minimum and instead sentenced Abel to serve a 120-month standard range minimum term and a maximum life term. CP 23-40; RP 11-12. The court ran the

sentence consecutive to a 2009 Clark County sentence for two counts of first degree child rape. CP 29; RP 12.

The court also ordered a lifetime community custody term. CP 29. Among the community custody conditions were prohibitions on the possession or consumption of alcohol and use or possession of "pornographic material or equipment of any kind[,]" and participation in alcohol and drug treatment as well as an anger management program. CP 36-37 (conditions 7, 8, and 10).

C. ARGUMENT

THE TRIAL COURT IMPOSED INVALID COMMUNITY CUSTODY CONDITIONS THAT SHOULD BE VACATED.

1. Alcohol possession

As a condition of community custody, the trial court ordered Abel not to possess or consume alcohol. CP 36 (condition 7). The prohibition on *possessing* alcohol is improper because it is neither crime-related nor specifically authorized by law.¹

¹ Having been convicted of first degree child molestation, Abel was subject to the sentencing provisions set forth in Former RCW 9.94A.712 (2006). Subsection (6)(a)(i) provided:

Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The

Whenever a sentencing court exceeds its statutory authority, its action is void. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). Unauthorized conditions of a sentence may be challenged for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

At the time Abel committed his crime, a sentencing court was authorized by statute to require an offender not to consume alcohol. Former RCW 9.94A.700(5)(d)(2006). The court could also impose "crime-related prohibitions." Former RCW 9.94A.700(5)(e). However, other alcohol-related conditions, such as treatment, are authorized only if related to the offense. Jones, 118 Wn. App. at 207-08. The court may therefore not prohibit the mere possession of alcohol unless alcohol is related to the crime. Jones, 118 Wn. App. at 204.

court may also order the 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, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

Alcohol was not related to Abel's crime. The court asked the prosecutor whether the offense was alcohol-related, and the prosecutor responded he did not believe it was. RP 12. The court also reviewed a Presentence Investigation Report (PSI). CP 45-53; RP 10. According to the report, Abel said he stopped drinking after he became married in 1999. CP 51.

Consistent with this information, the prohibition on consumption or possession of alcohol is crossed out in the community custody section of the judgment and sentence. CP 30. It reappears, however, in Appendix F to the sentence. CP 36. This is error. The judgment and sentence should be reversed and remanded, with an order to strike the prohibition on possession of alcohol because it exceeds the sentencing court's statutory sentencing authority.

2. Alcohol, drug, and/or anger management treatment

The trial court also imposed the following community custody condition:

Attend and successfully complete all in-patient and out-patient phases of an alcohol, drug, mental health, and/or anger management treatment program as established by the Community Corrections Officer and/or treatment facility, if available.

CP 37 (condition 10).

As discussed, alcohol did not contribute to Abel's offense. Nor is there evidence either drug use or anger played a role in the crime. The PSI states Abel denied ever using illicit drugs. CP 51. And in neither the "Official Version of the Offense" section of the report nor anywhere is there any indication alcohol, drugs, or undue anger contributed to the crime. CP 49-53.

As the Jones Court made clear, "alcohol counseling 'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense." Jones, 118 Wn. App. at 208. The same rule applies to other affirmative conduct, such as participation in drug treatment or an anger management program. This Court should order the condition stricken.²

3. Pornographic material or equipment

The trial court also prohibited Abel from using or possessing "pornographic material or equipment of any kind." CP 36 (condition 8). This condition is unlawful and should be stricken.

² Abel disclosed to the PSI writer that he had auditory hallucinations and that voices told him to do bad things to the victim of the instant offense. CP 48, 51-52. He therefore does not contest that portion of the condition calling for attendance in and successful completion of mental health treatment.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

The Court in Bahl held a "restriction on accessing or possessing pornographic materials is unconstitutionally vague." Bahl, 164 Wn.2d at 758. In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held that the following condition of community placement was unconstitutionally vague:

[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

Id. at 634-35.

Under this established authority, the trial court's prohibition on the use or possession "of pornographic material or equipment of any kind" is

unconstitutionally vague. This Court should therefore order the condition be stricken.

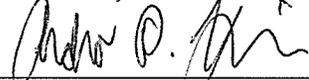
D. CONCLUSION

For the aforesaid reasons, this Court should reverse the judgment and sentence and remand with an order to strike the invalid community custody conditions.

DATED this 26 day of September, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Duane Abel

No. 30601-1-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 27th day of September, 2012, 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) and/or by depositing said document in the United States mail.

Teresa chen
tchen@wapa-sep.wa.gov

Duane Abel
Doc No. 334425
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Signed in Seattle, Washington this 26th day of September, 2012

X Patrick Mayovsky