30601-1-III

FILED
November 19, 2012
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUANE R. ABEL,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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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 concedes that the sentence should be amended where certain conditions are unauthorized or require clarification.

III. ISSUES

1. Is there authority for the "crime-related" prohibition against alcohol where the prosecutor informed the court that the offense was not alcohol-related or is this condition a scrivener's error?
2. Is there authority for the "crime-related" condition of alcohol, drug, or anger treatment where there is no record that these conditions are related to the offense, but where RCW 9.94A.704(4) permits the DOC to require an offender "to participate in rehabilitative programs"?
3. Is a prohibition against pornography unconstitutionally vague?

IV. STATEMENT OF THE CASE

The Defendant Duane Abel was at Airway Heights for a child rape

charge which took place in Clark County. CP 1-5. At the prison, he admitted that the acts also took place in Walla Walla County. CP 1-5. The Defendant then pled guilty to child molestation in the first degree in Walla Walla Superior Court No. 10-1-00350-6, reduced from two counts of child rape in the first degree. CP 6-8, 10-22.

He appeals from certain conditions of the sentence.

At sentencing, the court inquired whether the offense was related to alcohol. RP 12. The prosecutor stated it was not, and the court crossed out language in one part of the judgment and sentence, which would have prohibited alcohol consumption and possession. CP 30. However, probably as an oversight, the language remains in the appendix. CP 36. The appendix also requires treatment for alcohol/drug abuse, anger management, and mental health concerns and prohibits the possession or use of pornography. CP 36-37.

V. ARGUMENT

A. THE CONDITION PROHIBITING THE POSSESSION OF ALCOHOL SHOULD BE STRICKEN.

In Appendix F of the judgment ("Additional Conditions of Sentence"), there is a "crime related prohibition" regarding the possession of alcohol. CP 36. The Defendant challenges this condition.

The Defendant argues that the condition is improper, because it is not crime-related. *See* RCW 9.94A.703(3)(f) (as part of any term of community custody, the court may order an offender to comply with any crime-related prohibitions). In another subsection, the law authorizes a prohibition against alcohol *consumption*. RCW 9.94A.703(3)(e). However, a prohibition against *possession* is not authorized under either subsection.

The State concedes that the condition does not appear to be crime-related so as to be permitted under RCW 9.94A.703(3)(c), (d), or (f). *See also* RCW 9.94A.030(10) (defining "crime-related prohibition"). As the Defendant explains, there is no information that alcohol had any relation to the offense. Brief of Appellant at 4 (citing RP 12 and CP 51). Accordingly, this condition regarding *possession* should be stricken if it was intended.

B. THE LEGISLATURE, NOT THE COURT, HAS DELEGATED TO THE DEPARTMENT OF CORRECTIONS THE AUTHORITY TO REQUIRE DRUG/ALCOHOL/ANGER TREATMENT.

The Defendant challenges the condition requiring him to attend alcohol, drug, or anger-management treatment. Brief of Appellant at 5.

The Defendant does not object to mental health treatment. Brief of Appellant at 5, n.2. This condition again exists only in the appendix. CP 37. The court did not check any box in the body of the judgment requiring treatment. CP 30.

Again, this sentencing condition is described as "crime-related." CP 36. While the Defendant is correct that there is no information in the record that the offense was related to alcohol, drugs, or anger, it is worth noting that the Department of Corrections has this authority independent of the sentencing court. "The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws." RCW 9.94A.704(4).

Because the Department has the authority to require an offender under its supervision to participate in rehabilitative treatment, the sentencing court did not err in leaving this language intact in Appendix F.

If this Court strikes the language of alcohol, drug, and anger management (while leaving intact the mental health treatment) for the reason that it is not crime-related, the Court may yet find it worth noting that the Department is authorized by law to address those issues should they arise during the period of community custody, but under section .704, not .703.

C. THE CASE SHOULD BE REMANDED UNDER *STATE V. BAHL* FOR THE SENTENCING COURT TO CRAFT A PROPER CONDITION REGARDING PORNOGRAPHY.

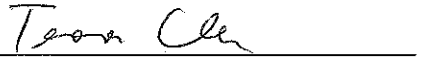
Appendix F prohibits the "use/possession of pornographic material or equipment of any kind." CP 36. The Defendant challenges this condition as unconstitutionally vague. Brief of Appellant at 6. The Defendant cites *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). No facts distinguish this case from *State v. Bahl*. There, the court remanded for resentencing, permitting the lower court to redraft the language with sufficient clarity. *State v. Bahl*, 164 Wn.2d at 762, 768 (Johnson, J., concurring) ("the sentencing court on remand may craft a community custody condition restricting Bahl's access to sexually explicit materials."). In the same way here, the case should be remanded for correction of this condition.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and remand for appropriate changes in the sentencing conditions.

DATED: November 19, 2012.

Respectfully submitted:



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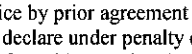
Andrew Zinner <zinnera@nwattorney.net> <mayovskyp@nwattorney.net> Duane Abel, #334425 Airway Heights Corrections Center P.O. Box 2049 Airway Heights, WA 99001	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 19, 2012, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**