

FILED

NOV 23, 2015

Court of Appeals
Division III
State of Washington

No. 33314-1-III

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

IAN ALMBERG, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

THE HONORABLE JUDGE JOHN COONEY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. ASSIGNMENT OF ERROR

- A. The sentencing court exceeded its authority when it imposed a non-crime-related prohibition as a condition of community custody.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Does the sentencing court exceed its authority when it imposes a non-crime-related prohibition as a condition of community custody ?

II. STATEMENT OF FACTS

The Spokane County Prosecutor's office charged Ian Almborg with second-degree robbery based on events that occurred October 8, 2014. (CP 1).

Mr. Almborg was employed as the night manager of the Jimmy John's sandwich shop in the Spokane Valley. (4/20/15 RP 32). On October 8, 2015, Mr. Almborg closed the shop between 10:30 and 10:45 pm and went out with friends. (4/21/15 RP 90). Concerned that he had forgotten to do something as part of his closing responsibilities, he returned to the shop around 1:20am. (4/21/15 RP 91). His co-worker, Jenny, and a friend, Jason, returned to the shop with him. (4/21/15 RP 91).

Jason took a trash bag out to the dumpster for Almborg. When he returned, he appeared scared, having seen someone in the dumpster area. (4/21/15 RP 94). Because of previous confrontations with homeless people in the dumpster area, Mr. Almborg went to his car, removed his metal baseball bat and walked to the dumpster area. (4/21/15 RP 95).

Almborg opened the hinged gate and saw Justin Lancaster and Chase McCoy lying on the ground inside the enclosed area. (4/20/15 RP 54; 4/21/15 RP 95). They had been talking while smoking cigarettes and marijuana. (4/20/15 RP 35;54). He told them to leave the area. (4/21/15 RP 96).

As they began to walk away, he asked them both about an unrelated incident from a year earlier. (4/21/15 RP 96). He first asked Lancaster, who did not answer, but rather, just stared at him. (4/21/15 RP 97). He turned his attention to McCoy, questioned him, and determined McCoy had had nothing to do with a previous incident. (4/21/15 RP 97-98). Lancaster testified Almborg told McCoy to empty his pockets. (4/20/15 RP 37). McCoy initially resisted but then complied. (4/20/15 RP 37).

McCoy testified Almborg told him to give over his backpack, shoes, skateboard and phone. Inside the backpack were his wallet,

some clothing, food, and marijuana pipes. (4/20/15 RP 65-66).

Almberg put the backpack on and then took it off. He said Almberg threw the cell phone on the ground and broke the glass. (4/20/15 RP 58). He said Jason, not Almberg took his coat and his lighters. (4/20/15 RP 57-58).

Lancaster backed away from Almberg, who followed him, and as he walked away, he heard McCoy calling him. (4/20/15 RP 38). Lancaster broke into a run in the opposite direction. (4/20/15 RP 98). He called the police. (4/20/15 RP 38).

Almberg came back through the parking lot and heard someone yelling, saw Jason, and then observed McCoy running away from the area. (4/21/15 RP 100).

McCoy reported that about three days later, he got a telephone call from the Riverside Station that his wallet was in their lost and found area. It was eventually returned to him. (4/20/15 RP 71).

Mr. Almberg was convicted by a jury. (CP 78). The sentencing court imposed a 3- month sentence with credit for time served. Included in the sentence was a community custody condition that he not possess or use marijuana. (CP 89).

The court stated:

“You’re not to use any controlled substances, nonprescribed controlled substances, during your term of community custody. That includes marijuana. Marijuana is not illegal under state law, but it is still illegal under the federal law so no possession or consumption of that while on community custody.”

(4/28/15 RP 158). He makes this timely appeal. (CP 100-113).

III. ARGUMENT

A. The Condition of Community Custody Restricting Use of and Possession of Marijuana Is Not Authorized By Law.

An erroneous sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Jones*, 118 Wn.App. 19, 204 n.9, 207-08, 76 P.3d 258 (2003).

Mr. Almberg challenges the condition imposed by the trial court expressly forbidding him from possession or use of marijuana or products containing THC. (CP 89).

The sentencing court may only impose punishment authorized by the SRA. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). The trial court lacks authority to impose a community custody condition unless authorized by the legislature. *State v. Warnock*, 174 Wn.App. 608, 2 P.3d 1173 (2013).

RCW 9.94A.505, the general sentencing statute of the SRA provides: “As part of any sentence, the Court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8).

RCW 9.94A.703(1) lists the mandatory standard conditions of community custody. The statute further authorizes the court to impose discretionary conditions, such as ordering an offender to remain inside a specific geographical boundary, or refrain from consuming alcohol or to “comply with any crime-related prohibitions.” RCW 9.94A.703(2)(3); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A crime-related prohibition means an order of the court prohibiting conduct that *directly relates to the circumstances of the crime* for which the offender has been convicted. RCW 9.94A.030(10). While no causal link need be established between the condition imposed and the crime committed, the condition must relate to the circumstances of the crime. A circumstance is defined as “an accompanying or accessory factor.” *State v. Williams*, 157 Wn.App. 689, 692 239 P.3d 600 (2010).

Here, the community custody condition imposed by the sentencing court is not crime-related. A condition is not crime-

related if there is no evidence linking the prohibited conduct to the offense. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). The charge and conviction here were for second-degree robbery and there was no evidence that any drugs were involved in the offense. A court may not impose drug-related conditions of supervision if there is no evidence that drugs were involved in the crime of conviction. *Warnock*, 174 Wn.App. at 614.

The court imposed the condition stating that under Washington law, marijuana use and possession is legal; however, under federal law it is not. The US Department of Justice has announced that it has traditionally relied on the states to address and enforce marijuana activity through its own narcotics laws. The federal government does *not* intend to enforce the Controlled Substances Act law against most individual users in states where marijuana is now legal to possess and use. DOJ Memo, James Cole, August 19, 2013¹.

Thus, even though it is legal in Washington, Mr. Almberg would still be subject to punishment for use or possession of marijuana, where the federal government would not enforce the

¹Available at:
www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

federal law, and the condition imposed was not a crime-related prohibition.

The court exceeded its authority by imposing a condition of Mr. Alberg's sentence that was not crime related; the condition should be stricken. *Warnock*, 174 Wn.App. at 614; *O'Cain*, 144 Wn.App. at 775.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Alberg respectfully asks this Court to remand to the superior court with instructions to strike the offending condition.

Submitted this 23rd day of November 2015.

Marie Trombley, WSBA # 41410
Attorney for Ian Alberg
P.O. Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant IAN ALMBERG, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the APPELLANT'S OPENING BRIEF was sent on November 23, 2015 by USPS first class mail, postage prepaid, or electronically served, by prior agreement between the parties, to the following, as indicated:

Ian AlMBERG
13306 E. 25th Ave
Spokane Valley, WA 99216

EMAIL:SCPAappeals@spokanecounty.org
Brian Clayton O'Brien
Spokane County Prosecuting Attorney
1100 W. Mallon Ave
Spokane, WA 99260