

**FILED**

JAN 07, 2016

Court of Appeals  
Division III  
State of Washington

**33314-1-III**

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

IAN ALMBERG, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENT OF ERROR**

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

## **II. ISSUE PRESENTED**

Whether the trial court erred in prohibiting the defendant from possessing or using marijuana while on community custody where defendant specifically agreed to that provision, and where the court was aware of defendant's prior and current history with marijuana and other controlled substances?

## **III. STATEMENT OF THE CASE**

The defendant was charged with one count of Second Degree Robbery in Spokane County superior court from an incident occurring on or about October 8, 2014. CP 1.

On the date of the incident, Mr. Almberg, while working at Jimmy John's Sandwich shop, confronted two men, Justin Lancaster and Chase McCoy, who were loitering near the Jimmy John's dumpster.<sup>1, 2</sup> After another employee dropped off a bag of garbage at the dumpster and saw the two men, the defendant confronted the men, with a metal bat, telling

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<sup>1</sup> Mr. Lancaster and Mr. McCoy were smoking a bowl of marijuana and "chitchatting" at 1:30 a.m., in the fenced enclosure around the Jimmy John's dumpster. RP 54.

<sup>2</sup> Prior to the incident, Mr. Almberg was acquainted with both Mr. Lancaster and Mr. McCoy through his roommate. CP 89.

the men to “get out of here. Stand up and get out now. Leave.” RP 36. He pounded the bat on the ground as he gave these commands. RP 36.

However, rather than just letting the two men leave, the defendant questioned Mr. McCoy about an “unrelated incident that happened at [Mr. AlMBERG’s] apartment the previous year.” RP 96.<sup>3</sup> The defendant then demanded Mr. McCoy’s backpack, his shoes, and his cellular phone. RP 56, 58. The defendant then smashed the cell phone with the baseball bat. RP 58. The most valuable things taken from Mr. McCoy during the incident were his glass marijuana pipes which were located in the backpack. RP 65-66. Another individual who accompanied the defendant in the robbery, stomped on and kicked Mr. McCoy. RP 69. At one point during the altercation, the defendant slammed the bat into Mr. McCoy’s chest. RP 69. Defendant was convicted by a jury. CP 78.

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<sup>3</sup> During his testimony, the defendant agreed he confronted the two men at the dumpster, while armed with a bat, and “questioned” Mr. McCoy about an incident occurring the year before. RP 96-98. Defendant’s testimony differed from Mr. Lancaster and Mr. McCoy’s testimony in that he testified that the men left a backpack and a sleeping bag in the dumpster enclosure. RP 98.

At sentencing, the prosecutor made recommendations to the court as to the imposition of community custody conditions:

There is [sic] 12 months of community custody. The State is asking that the conditions be ... that he not consume controlled substances except with a valid prescription.

RP 154.

The defendant agreed to all the State's recommended conditions:

If I can start by saying given the posture of the case, Mr. Almborg and I are really appreciative of the State's willingness to make this recommendation. **We are asking the Court to endorse what the State has proposed, honestly, every detail.**

Judge, Mr. Almborg is a young man who, before this, had almost no history. He had a prior misdemeanor, possession of marijuana, and no other criminal convictions. He's obviously had some ups and downs in a young life. He testified that before the incident that the Court heard he'd been homeless on occasions but at the time of the incident, he was employed full time, seemed like he was doing pretty well. As a result of what happened, however, he lost his employment, and he ended up becoming homeless again.

The Court may recall another case that we are resolving in this courtroom where Mr. Almborg was sleeping in his car. When contacted by police, they found two pills inside the vehicle and it resulted in a separate felony possession charge which he has pled to and is set to be sentenced in this court next week.

He's had a tough time since last fall. Forgive me. It doesn't excuse what happened and he and I very much respect the jury's verdict. Given the circumstances, I am asking the

Court to impose the low end of the range, three months ...  
**and all other conditions requested by the State.**

RP 154 – 156 (emphasis added).

The Court followed the parties' recommendations, stating:

The second thing I'm going to tell you is we have older people that come in here in positions similar to yours and you look at their criminal record and it starts when they're your age and they spend their whole life going through this process, in and out of jail, being convicted over and over again. So you need to make a decision at this point to change things around otherwise this is your whole future. Once you get into this cycle, its hard to get out of this cycle...

Sir, I will follow the **agreed recommendation on sentencing**, imposing three months ... You will be placed on community custody for 12 months ...

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 federal law so no possession or consumption of that while on community custody.<sup>4</sup>

RP 157-158 (emphasis added).

Mr. Almberg timely appealed.

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<sup>4</sup> The court was also aware of information that defendant had previously sold marijuana to Mr. Lancaster, but excluded that testimony from trial as prejudicial and irrelevant. RP 13, 16.

#### IV. ARGUMENT

UNDER THE FACTS OF THIS CASE, THIS COMMUNITY CUSTODY CONDITION THAT DEFENDANT MAY NOT USE OR POSSESSION MARIJUANA WAS APPROPRIATE AND REASONABLE.

The defendant argues the trial court exceeded its authority when imposing a community custody condition that the defendant not possess or consume controlled substances, including marijuana and or products containing Tetrahydrocannabinol (THC), while supervised on community custody. Defendant's argument fails.

An appellate court reviews crime-related community custody conditions for an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010). A court abuses its discretion when it adopts a view that no reasonable judge would take. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Stated differently, a trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

At the time of sentencing, the defendant, through his attorney agreed to all community custody conditions recommended by the State. RP 155. The trial court was aware that the defendant had sold marijuana to Mr. Lancaster on previous occasions, even though this information was excluded from trial. RP 13. The testimony showed that Mr. McCoy's

backpack, taken by the defendant during the robbery, contained a number of glass marijuana smoking pipes. RP 65-66. The court was aware that Mr. Almberg had previously been convicted of a misdemeanor marijuana offense. RP 155. The court was also aware that Mr. Almberg had already pled to an unrelated drug charge, and was awaiting sentencing on that matter. RP 155.

All of these facts would lead any reasonable person to believe that the use or possession of marijuana contributed in some fashion to the offense. Further, based on the the parties' joint recommendation that defendant not be allowed to use, possess, or consume any non-prescribed drugs, the court did not abuse its discretion in imposing this community custody condition.

Possession of marijuana is prohibited because it is still a controlled substance federally,<sup>5</sup> and it cannot be used without a prescription.<sup>6</sup> Defendant's argument that the Department of Justice may choose not to enforce its marijuana laws against "most individual users in states where

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<sup>5</sup> The sentencing judge noted that the defendant's prohibition against using controlled substances included marijuana as it is "still illegal under federal law." RP 158.

<sup>6</sup> The judgment and sentence contains language allowing for the possession of controlled substances pursuant to lawfully issued prescriptions. CP 106.

marijuana is now legal to possess and use” is irrelevant to the inquiry here.<sup>7</sup> The court did not abuse its discretion.

## V. CONCLUSION

The trial court did not abuse its discretion when it prohibited the defendant from using or possession marijuana while supervised on community custody. Defendant’s criminal history and substance abuse charges, though not countable toward his offender score, were discussed at sentencing, and resulted in the court’s logical prohibition of the use or possession of any such substances. The State respectfully requests the court affirm the judgment.

Dated this 7 day of January, 2016.

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<sup>7</sup> Appellant’s Br. at 6.

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

STATE OF WASHINGTON,

Respondent,

v.

IAN S. ALMBERG,

Appellant,

NO. 33314-1-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 7, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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1/7/2016

(Date)

Spokane, WA

(Place)

Kim Cornelius

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