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Court of Appeals
Division III
State of Washington

NO. 33551-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LUIS HERNANDEZ-RIVERA, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENT OF ERROR

A. ISSUE PRESENTED BY THE ASSIGNMENT OF ERROR

1. Whether the trial court abused its discretion and violated the *real facts doctrine* when it imposed 12 months of community custody?

B. ANSWER TO THE ISSUE PRESENTED BY THE ASSIGNMENT OF ERROR

1. The trial court did not abuse its discretion and did not violate the *real facts doctrine* when it imposed 12 months of community custody.

II. STATEMENT OF THE CASE

The Appellant, Luis Hernandez-Rivera pled guilty to possession of a controlled substance, Vicodin on June 18, 2015. RP at 1-4; CP at 17-24. Hernandez-Rivera was sentenced that same day. *Id.* The only matter disputed at sentencing was the issue of community custody. RP at 3. Counsel for Hernandez-Rivera argued that imposing 12 months of community custody was not practical because Hernandez-Rivera signed a waiver of extradition to return to Nevada to take of felony matters there. *Id.* at 3; 7.

Before accepting Hernandez-Rivera's plea of guilty, the trial court clarified that:

The deal is is [sic] that you're going to have credit for time served, so you'll be released, except for the extra – on this charge, except

for the extradition. You understand your costs of financial obligations. There's an issue regarding community custody. The State wants you to be on community custody for 12 months. Your lawyer is going to argue against it. There will [sic] no other charges filed in the State of Washington based on this, but you could be charged by somebody else, I guess, if there's something. We're not binding on them, I guess. Is that your understanding of the deal?

RP at 4. Hernandez-Rivera replied that he understood. *Id.* The trial court then read aloud Hernandez-Rivera's statement as to what he did that made him guilty of the crime of possession of a controlled substance.

. . . on May 13, 2015, I was a passenger in a car that was pulled over. The driver was arrested and I was ordered to step out of the vehicle. There was a black trash bag on the floor board of the car with assorted trash which contained a small bag of crushed Vicodin, which belonged to the driver's mother for a medical situation. However, the trash bag was at my feet and I knew it was there because we hadn't finished cleaning out the car, is that true?

RP at 5; CP at 15. Hernandez-Rivera stated the above facts were true. RP

at 5. The State then supplemented the record with the following facts:

According to Detective Fairchild of the Lead Task Force, the 13th of May, 2015 about 7:30 in the evening, a Sunnyside police officer made a traffic stop on a Pedro Almaguer (phonetic) out of Outlook who he knew was suspended. The officer observed the driver and this passenger leaning

towards each other at the center console and reaching towards the floor with their arms as if they were going to conceal something. Officer Barry (phonetic) also smelled marijuana and commented on it. The driver said that he had his bud pipe which was next to him and he was taken into custody for that. If recollection serves and this isn't out of the report, young Mr. (unintelligible) here is under 21 and not allowed to have marijuana. When this defendant stepped out of the vehicle a .9 millimeter bullet and a device for quickly and painless getting bullets into a magazine for a semi-automatic weapon fell to the ground and a baggy containing pills fell to the front passenger floorboard and I'm not sure if that's what Mr. Hernandez-Rivera is now claiming had the crushed Vicodin. The defendant advised that those pill were him [sic]– those pills were Vicodin but there [sic] were not his and he was detained at the time. And I bring that up with a couple of facts that are going to contribute to the State's argument for community custody.

Officers couldn't get the car running again, so they had to impound it and when they . . . [w]hen they dropped the hood, the force dislodged a semi-automatic pistol from underneath the steering column where it had been tucked up underneath. The driver claims that the gun was handed to him by this defendant. Now, I can't prove that I'm really in a catch 22 situation. . . . So I really am in a bind as to that, but it's one of those things that just the fact that the gun is there is something that the Court needs to know about even that I can't prove that it's this defendant's.

As well, Judge, in the center console there was a bunch of gang related paraphernalia and writing and at least the driver is a known gang associate giving us an inference that this defendant is also gang affiliated. . . . Those are the general facts, though, not just there was some crushed Vicodin and some trash on the floorboard.

RP at 5-7. The trial court next asked the parties whether possession of the controlled substance was being contested. *Id.* at 7. The State replied, “No, the possession is not being contested. The fact that it’s Vicodin is not being contested but I don’t think the parties see eye to eye on anything outside the bear [sic] elements of the offense.” *Id.* The defense added that, “I will tell you nothing with regards [sic] to the gun is agreed but if you’re just referring to the Vicodin, my client knew that it was in the car, and he knew that it was Vicodin.” *Id.*

The trial court inquired of Hernandez-Rivera whether he disputed any of the facts the State just referenced. *Id.* at 7. Hernandez-Rivera answered, “No, Your Honor.” *Id.* Counsel for Hernandez-Rivera did not object either. *Id.*

The parties then argued their respective sentencing recommendations. The State argued:

Judge, the credit for time served is agreed. Mr. Hernandez-Rivera is going to be extradited back to Carson City, Nevada, [sic] for their equivalent of a burg 1 with a

firearm. It's got a different title, but near as I can tell it's the unlawful entry into a residence with the intent to commit a crime while armed with a firearm. Same – same basic concept, which is another reason that I think community custody is appropriate. We've got somebody that whether or not they committed the burglary was on the lamb up here with gang members, drugs and at least in proximity to a gun, and you know, the State's theory is I've been very clear about is that he was the one who was in possession of the gun. This is not somebody that we think needs – that we think can be trusted to go without community custody even on the drug offense. I have no problem with him somehow transferring his community custody to Nevada. . . . I just think that at some point this guy needs to be supervised and somebody needs to take a look at this, at least check him for drug and alcohol issues, if not go along with any treatment which we don't know whether he needs it or not, and the mere fact that we're shipping him back to Nevada to be their problem doesn't make his problems go away. And it doesn't make it not our problem because the last time he was in trouble in Nevada, he came here. It might happen again.

RP at 7-8. Counsel for Hernandez-Rivera explained:

My client doesn't have any felony criminal history, none. Were it not for the extradition we might have a different resolution, so I don't think we can attribute, certainly under the law, we can't attribute the firearm in the driver's compartment somewhere to my client. He hasn't owned the car, it's not – the person who owns it is not related to him.

He was simply getting a ride from somebody in the community. My client is not identified as a gang member.

The Vicodin, he – what he says is consistent with the police reports, you know, it was found on the floorboard. The officer says that it fell, I don't know whether the officer saw it fall from anywhere because it doesn't say that. It was on the floorboard, he didn't notice it before and there it was. There's a lot of stuff in that car, so I think the fact that my client has no felony criminal convictions. He doesn't have a drug history. He doesn't have a gun history. He has nothing else. He's going to Carson, and by the way, Nevada charged him with a crime. He's not somebody who's convicted in Nevada and then ran from parole. He's not on the lamb from anywhere. He didn't know – we have no idea. Maybe they sent a summons to the wrong address and now they know he's – a warrant issued after he was already gone. So, the idea that he's somehow on the lamb, I mean, the State hasn't shown or proved or brought any documentation to my notice indication that in fact he was arrested for that crime and was, you know, bailed out and then didn't go back. That's not the situation. It's a brand new criminal allegation in Nevada, okay. Yes, it's a – I think it's a felony in Nevada. It has to be or otherwise they wouldn't be extraditing and certainly, the, you know, sort of equivalent or the closest thing here would be a felony, but again, that a brand new situation. We're not talking about somebody that had, you know, has a drug history of drug use, someone with a history of felonies, somebody with – who was out DUI [sic], it's not his car. We know

for a fact that the other people in the car, the drivers for sure, has a problem and I believe even the backseat passenger had cocaine. So we had a meth addict and a cocaine addict. My client doesn't have anything to do with meth, cocaine, pot or anything else.

...

So, I think when we're talking about justice and what's reasonable and what's actually going to happen, the fact is he's going to be extradited to Nevada and the idea that we should just impose probation when it's discretionary because somehow the prosecutor thinks he's a bad guy and we need to keep an eye on him is silly. . . .

So, it's arguing out of both sides of your mouth for the State to presume that we should do community custody. It doesn't make any sense at all. It's a waste of resources. It's really a way to screw around with my client and say, not only do you have to go down there and deal with that, but in six months when you get released or whenever you're doing with that, maybe they have prison, I don't know what the deal is in Nevada because he hasn't been found guilty, then by the way, come back to Washington and do 12 months of community custody with no family, no home, no job, no nothing. That doesn't make any sense. That's really just a way to say we can control you and he's not the guy that we need to be worrying about in our system. It just doesn't make any sense.

Id. at 8-10.

After considering the arguments of counsel and the statements of Hernandez-Rivera, the trial court sentenced Hernandez-Rivera to 36 days of jail with credit for 36 days, 12 months of community custody, and imposed \$1,100 in legal financial obligations. *Id.* at 12. The court explained its rationale for imposing community custody as follows:

I'm going to leave him on community custody. I know it's a pain but the reality is confronting another charge in another state, if you were here, a local fellow, I wouldn't hesitate to impose community custody. I hate to have him put up a criminal issue in another state and drop the community custody because the (inaudible) can mean that – and I guess I – you're getting out, it should be a pain for you, too. It should be something that you don't like, so you don't do it again or I hope you don't but –[.]

Id. at 12.

This timely appeal then followed.

III. ARGUMENT

A. **THE REAL FACTS DOCTRINE WAS NOT VIOLATED BECAUSE HERNANDEZ-RIVERA DID NOT DISPUTE THE FACTS THE STATE SUPPLEMENTED THE RECORD WITH.**

Hernandez-Rivera acknowledged and/or admitted the facts the State supplemented the record with at the sentencing hearing. RP at 7. These facts pertain to a gun being found in the car that Hernandez-Rivera was a passenger in and Hernandez-Rivera's possible gang affiliations. *See*

Brief of Appellant at 9. Because Hernandez-Rivera acknowledged and/or admitted these facts, his argument the *real facts doctrine* was violated is unpersuasive.

The *real facts doctrine* prohibits trial courts from considering information not admitted, acknowledged, nor proved during a sentencing hearing or during trial. *State v. Bell*, 116 Wn. App. 678, 683, 67 P.3d 527 (2003). The doctrine provides that:

In determining any sentence, the **trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.**

Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence.

RCW 9.94A.530(2) (emphasis added). A violation of the *real facts doctrine* only occurs when two conditions are established. First, a defendant must clearly dispute specific material facts relevant to a sentencing hearing or a trial. *Bell*, 116 Wn. App. at 683-85. Second, the trial court must improperly rely on the disputed material facts. *Id.*

Authority directly on point is *Bell*. In *Bell*, the defendant claimed the trial court violated the *real facts doctrine* when it imposed an

exceptional sentence above the standard range. 116 Wn. App. at 679. The defendant stipulated to the admissibility of the police report and the victim's statement as the factual basis for the guilty plea. *Id.* at 682. Although the defendant indicated there were several things in the victim's statement that he did not agree with, he did not challenge the statement. *Id.* The trial court interpreted this as "some partial possible equivocation" of the factual basis. *Id.* The court then asked the defendant if he conceded the facts or wished to enter an *Alford* plea. *Id.* Defense counsel replied the defendant would have likely entered an *Alford* plea and provided the following rationale to the court: "He is making this deal as part of a plea bargain and didn't necessarily agree with all the allegations made against him or the severity of them from the state's point of view." *Id.* On appeal, the defendant alleged the trial court improperly relied on the victim's statement when it imposed an exceptional sentence based on the domestic violence aggravator. *Id.* This Court found the defendant "did not sufficiently contest any specific material fact, let alone any fact relevant to the sentencing." *Id.* at 685. The defendant's "vague statement" that he did not entirely agree with the exhibit used in support of the factual basis was not sufficient to trigger a violation of the *real facts doctrine*. *Id.* at 683. Something more is required. The defendant in *Bell* needed to dispute specific material facts relevant to his sentencing hearing

and the trial court must have improperly relied on those disputed facts when it sentenced him. Neither of those requirements were met in *Bell*.

In contrast to *Bell*, the court found the *real facts doctrine* had been violated in *State v. Young*, 51 Wn. App. 517, 754 P.2d 147 (1988). The defendant in *Young* pled guilty to taking a motor vehicle without permission, but did not admit or acknowledge any facts in support of his *Alford* plea. 51 Wn. App. at 520. The defendant, however, agreed the trial court could review the police report as the factual basis for the *Alford* plea. *Id.* During the sentencing hearing, the State urged the court to consider the facts in the police report in support of an exceptional sentence. *Id.* The defendant argued the court could not consider the facts in the police report because those facts were neither admitted nor proved. *Id.* The trial court relied on the facts in the police report when it sentenced the defendant to an exceptional sentence. *Id.* On appeal, the *Young* Court found:

It is clear from both the transcript of the sentencing hearing and the trial court's findings and conclusions that the court relied on the facts alleged by the State in the certification of the probable cause. It is equally clear that none of those facts were 'admitted, acknowledged, or proved.' There is nothing in the record to suggest that Young admitted the truth of the factual allegations contained in the certification of probable cause. On the contrary, by

entering an *Alford* plea, Young clearly manifested his intention not to make such an admission. Furthermore, he specifically sought to limit the court's use of the State's factual allegations to a determination of whether there was a factual basis for his plea. Finally, since Young made it clear at sentencing that he intended to dispute the State's factual allegations, he cannot be deemed to have admitted or acknowledged them as required by RCW 9.94A.370(2). Consequently, the court was required not to consider the allegations contained in the certification of probable cause unless the State could prove those allegations at an evidentiary hearing.

Id. at 521-22. Here, unlike *Young*, the trial court did not consider information it was prohibited from when it sentenced Hernandez-Rivera. And like the defendant in *Bell*, Hernandez-Rivera did not specifically dispute any material facts relevant to the sentencing hearing.

The record below demonstrates the trial court did not violate the *real facts doctrine* when it sentenced Hernandez-Rivera. The State supplemented the record with facts that referenced a gun being found in the car Hernandez-Rivera was a passenger in and the discovery of gang paraphernalia which supported an inference Hernandez-Rivera had gang affiliations. *See* RP at 5-7. After the State supplemented the record, the trial court specifically asked Hernandez Rivera: "... And any dispute, Mr. Hernandez, with that I've heard." *Id.* at 7. Hernandez-Rivera replied,

“No, Your Honor.” *Id.* Counsel for Hernandez-Rivera also did not object at the time. *Id.* The significance of this is that Hernandez-Rivera effectively admitted and/or acknowledged the facts the State supplemented the record with. These are the same facts that Hernandez-Rivera now claims the trial court improperly relied on in sentencing him. The *real facts doctrine* does not permit defendants to admit or acknowledge facts and then later contest the same facts. To interpret the doctrine in such a manner runs afoul of the plain language of RCW 9.94A.530(2). Hernandez-Rivera should not be permitted to dispute facts on appeal when he failed to dispute the facts below.

Moreover, the State’s argument in support of community custody referenced several of the same facts it stated previously in supplementing the factual basis for the record.

Judge, the credit for time served is agreed. Mr. Hernandez-Rivera is going to be extradited back to Carson City, Nevada, [sic] for their equivalent of a burg 1 with a firearm. It’s got a different title, but near as I can tell it’s the unlawful entry into a residence with the intent to commit a crime while armed with a firearm. Same – same basic concept, which is another reason that I think community custody is appropriate. We’ve got somebody that whether or not they committed the burglary was on the lamb up here with gang members, drugs and at least in proximity to a gun, and you know, the State’s theory is I’ve been very clear

about is that he was the one who was in possession of the gun. This is not somebody that we think needs – that we think can be trusted to go without community custody even on the drug offense. I have no problem with him somehow transferring his community custody to Nevada. . . . I just think that at some point this guy needs to be supervised and somebody needs to take a look at this, at least check him for drug and alcohol issues, if not go along with any treatment which we don't know whether he needs it or not, and the mere fact that we're shipping him back to Nevada to be their problem doesn't make his problems go away. And it doesn't make it not our problem because the last time he was in trouble in Nevada, he came here. It might happen again.

RP at 7-8; *Cf. with* RP at 5-7. The State again cited Hernandez-Rivera's proximity to the gun in the car and its belief that Hernandez-Rivera had gang affiliations. *Id.* at 7-9. Significantly, these are the same facts that Hernandez-Rivera declined to dispute when given the opportunity to do so. *Id.* at 7.

Where the State's argument in support of community custody differed from the factual basis was the State also referenced the pending felony charges in Nevada and the rehabilitating aspect of community custody. *Id.* at 7-8; *Cf. with Id.* at 5-7. The State argued community custody could treat Hernandez-Rivera for a drug or alcohol problem if it was determined that he had one. *Id.*

By not contesting the facts the State supplemented the record with, Hernandez-Rivera effectively admitted and/or acknowledged these facts. It was not then improper for the State to argue these facts in support of community custody.

- 1. Even if Hernandez-Rivera sufficiently disputed the facts advanced by the State in support of community custody, there is no evidence the trial court relied on these facts when it sentenced Hernandez-Rivera.**

To be clear, the disputed facts would be the gun being found in close proximity to Hernandez-Rivera and Hernandez-Rivera's perceived gang affiliations. *See* Brief of Appellant at 9. It was not disputed that Hernandez-Rivera would be extradited to Nevada. RP at 9-10. It was also not disputed that Hernandez-Rivera faced the equivalent of a first degree burglary charge in Nevada. *Id.* In fact, Hernandez-Rivera argued his pending extradition to Nevada was grounds for the trial court not to impose community custody under RCW 9.94A.702. *Id.*

Assuming for the sake of argument that Hernandez-Rivera sufficiently disputed material facts at the sentencing hearing, the *real facts doctrine* requires that another condition be satisfied too. There also must be evidence the trial court improperly relied on the disputed facts when it

sentenced Hernandez-Rivera. The trial court's reasoning for sentencing Hernandez-Rivera to community custody was as follows:

I'm going to leave him on community custody. I know it's a pain but the reality is confronting another charge in another state, if you were here, a local fellow, I wouldn't hesitate to impose community custody. I hate to have him put up a criminal issue in another state and drop the community custody because the (inaudible) can mean that – and I guess I – you're getting out, it should be a pain for you, too. It should be something that you don't like, so you don't do it again or I hope you don't but –[.]

RP at 12. The trial court did not rely on the gun or Hernandez-Rivera's possible gang affiliations as a basis for imposing community custody.

Accordingly, Hernandez-Rivera cannot demonstrate the *real facts doctrine* was violated because there is no evidence the trial court relied on disputed facts when it sentenced him.

The remaining issue is whether the trial court abused its discretion when it sentenced Hernandez-Rivera to 12 months of community custody.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED HERNANDEZ-RIVERA TO 12 MONTHS OF COMMUNITY CUSTODY.

Hernandez-Rivera argues the trial court abused its discretion by relying on disputed facts in violation of the *real facts doctrine* when it

sentenced him. *See* Brief of Appellant at 8. The decision of the sentencing court will not be disturbed absent a finding of abuse of discretion. *State v. Corona*, 164 Wn. App. 76, 78-79, 261 P.3d 680 (2011) (holding that a sentencing court's decision will be reversed only where there is a clear abuse of discretion or misapplication of the law). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *Id.* at 79-80 (finding abuse of discretion where sentencing court erroneously imposed fine); *see also State v. Fliieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (finding abuse of discretion where sentencing court failed to recognize its discretion not to impose community custody under RCW 9.94A.702); *State v. Partee*, 141 Wn. App. 355, 361-63, 170 P.3d 60 (2007) (finding abuse of discretion where trial court erroneously believed its only option was to revoke the special sex offender sentencing alternative instead of imposing consecutive terms of confinement for violations). An abuse of discretion may also arise when the trial court applies the wrong legal standard or bases its ruling on an erroneous interpretation of the law. *Corona*, 164 Wn. App. at 78; *see also State v. Brown*, 145 Wn. App. 62, 80, 184 P.3d 1284 (2008) (finding abuse of discretion where trial court misapplied the rule of lenity and improperly sentenced the defendant to a standard range sentence under the wrong

offense seriousness level). To determine if the trial court applied the wrong legal standard, the choice of the law and its application to the facts in the case are reviewed de novo. *State v. Haney*, 125 Wn. App. 118, 123, 104 P.3d 36 (2005). The Washington Supreme Court explained the abuse of discretion standard as follows:

The reviewing court will find an abuse of discretion ‘when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.’ A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is ‘manifestly unreasonable’ if the court despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take,’ and arrives at a decision ‘outside the range of acceptable choices.’

State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006).

In this case, Hernandez-Rivera has not asserted the trial court misapplied the law when it sentenced him. Thus, the analysis can be narrowed to whether the trial court’s decision to sentence Hernandez-Rivera to community custody was manifestly unreasonable or based on untenable grounds or for untenable reasons. *Corona*, 164 Wn. App. at 78-79.

The standard range for Hernandez-Rivera was zero days in jail up to six months in jail for possession of a controlled substance. CP at 18. Hernandez-Rivera was sentenced to 36 days in jail with credit for 36 days. RP at 12. He was not subject to mandatory community custody under RCW 9.94A.701 because his sentence did not exceed one year. The trial court was afforded discretion pursuant to RCW 9.94A.702 in whether to sentence Hernandez-Rivera to community custody. Under RCW 9.94A.702:

- (1) If an offender is sentenced to a term of confinement for one year or less for one of the following offenses, the court may impose up to one year of community custody:
 - (a) A sex offense;
 - (b) A violent offense;
 - (c) A crime against a person under RCW 9.94A.411;
 - (d) A felony violation of chapter 69.50 or 69.52 RCW, or an attempt, conspiracy, or solicitation to commit such a crime; or
 - (e) A felony violation of RCW 9A.44.132(1) (failure to register).
- (2) If an offender is sentenced to a first-time offender waiver, the court may impose community custody as provided in RCW 9.94A.650.

As explained above, Hernandez-Rivera has not demonstrated that the trial court violated the *real facts doctrine*. Hernandez-Rivera admitted

and/or acknowledged the facts he now claims to dispute. Even if Hernandez-Rivera arguably disputed material facts at the sentencing hearing, the trial court's reasoning for imposing community custody does not reflect that it relied on the disputed facts when it sentenced him. Hernandez-Rivera is, therefore, unable to prove an abuse of discretion based on violation of the *real facts doctrine*.

What remains then is whether the trial court abused its discretion when it sentenced Hernandez-Rivera to community custody. Hernandez-Rivera alleges the trial court's decision to sentence him to community custody was not based on tenable grounds or tenable reasons since he would be extradited to Nevada and "it served no useful purpose." Brief of Appellant at 10. Hernandez-Rivera has simply not shown that the trial court's decision was based on untenable grounds or for untenable reasons.

First, there were tenable grounds for the trial court to sentence Hernandez-Rivera to community custody. As previously discussed, the trial court had the authority to sentence Hernandez-Rivera to 12 months of community custody pursuant to RCW 9.94A.702. Second, there were tenable reasons supporting sentencing Hernandez-Rivera to community custody. The trial court intended to treat Hernandez-Rivera just as it would a "local fellow" irrespective of the fact that he would be extradited to Nevada. RP at 12. The trial court also sentenced Hernandez-Rivera to

the very low end of the standard range by imposing just 36 days of jail, which equated to credit for time served. *Id.*; CP at 18.

One benefit of sentencing Hernandez-Rivera to community custody was the rehabilitative aspect. For someone like Hernandez-Rivera who did not have any prior felony history but who found in himself in a car with a bag of crushed Vicodin at his feet, community custody could help facilitate substance abuse treatment if he needed it. It was not known at the time of the sentencing hearing whether Hernandez-Rivera had a substance abuse problem. Counsel for Hernandez-Rivera argued that he did not have “anything to do with meth, cocaine, pot or anything else.” RP at 9. But, Hernandez-Rivera had not obtained an evaluation to determine if, in fact, he had a substance abuse problem.

Additionally, the terms of community custody imposed by the trial court sought to ensure that Hernandez-Rivera did not possess or consume any controlled substances. The trial court ordered Hernandez-Rivera to “not unlawfully possess or consume any controlled substances except pursuant to a lawfully issued prescription” and to “[r]eport for urinalysis as ordered by the Department of Corrections.” CP at 19-20. The conditions of community custody also required Hernandez-Rivera to notify the Department of Corrections if he attended or was ordered to attend chemical dependency treatment. *Id.* at 20.

The conditions of community custody imposed by the trial court also related to the underlying offense of possession of a controlled substance. *See State v. Munoz*, 190 Wn. App. 870, 892, 361 P.3d 182 (2014) (holding that in order for sentencing courts to impose community custody conditions requiring “rehabilitative programs” or “affirmative conduct,” there must be evidence the conditions relate to the underlying offense); *see also State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003).

Finally, Hernandez-Rivera presented no evidence that his community custody in this state could not be transferred to Nevada in the event that he was placed on community custody or the equivalent there. In fact, RCW 9.94A.745 provides an interstate compact for the supervision of adult offenders who are sentenced to community custody in more than one state.

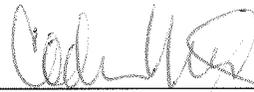
All of these factors reinforce that the trial court’s decision to sentence Hernandez-Rivera to community custody did not constitute an abuse of discretion. Hernandez-Rivera failed to prove that the trial court’s decision to sentence him to community custody was manifestly unreasonable or that it was based on untenable grounds or for untenable reasons.

III. CONCLUSION

Hernandez-Rivera has failed to prove the trial court violated the *real facts doctrine* when it sentenced him to 12 months of community custody. By the same accord, Hernandez-Rivera has not shown the trial court abused its discretion when it sentenced him to 12 months of community custody.

Respectfully submitted this 13th day of June, 2016

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Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on June 13, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. Kenneth H. Kato at khkato@comcast.net.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of June, 2016 at Yakima, Washington.



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