

NO. 34593-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO ARROYO,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

Mr. Arroyo's improperly imposed community custody conditions must be stricken.

1. *The prosecution properly concedes condition 14 should be stricken.*

Condition 14 contains an overbroad and vague prohibition on possessing "graffiti in any form." The prosecution agrees this condition embraces legitimate speech, and the state's interest in prohibiting gang-related symbols is adequately addressed in other conditions. Resp. Brief at 10-11. This concession is appropriate and this condition should be stricken.

2. *The prosecution properly concedes condition 10 should be modified on remand.*

Condition 10 contains an overbroad and vague prohibition on possessing or being in the vicinity of someone else's possession of any weapon, including knives of any description and any weapon replica. CP 36. The prosecution agrees "knives of any description" is "excessive." Resp. Brief at 8. This language would include a butter spreader or a plastic utensil.

In addition, the "weapon replica" phrase is unduly vague in the context of this very broadly phrased condition, which contains no

element that Mr. Arroyo know of another person's possession of such an implement. As Mr. Arroyo explains in his opening brief, the statutory prohibition on deadly weapons suffices to address any potential danger, as the prosecution appears to concede. Resp. Brief at 8-9 (citing RCW 9.41.250; RCW 9.41.270; RCW 9.41.280). This condition strays from implements that are unlawful to possess or actually dangerous and should be modified on remand to be limited to such unlawful and dangerous weapons.

3. The court's order that Mr. Arroyo comply with "all directions" of a CCO gives unfettered and arbitrary discretion to the Department of Corrections and exceeds statutory authority.

The prosecution tries to justify the court's imposition of Condition 2, which broadly requires that Mr. Arroyo must "comply with all directions of your community custody or probation officer." CP 35. It contends this condition is merely repeating the legislative authority of the Department of Corrections (DOC) to establish conditions. This claim is incorrect.

Condition 2 is a court-ordered condition, but a trial court may only impose crime-related conditions if there is evidence that the prohibited conduct was involved in the crime of conviction. RCW

9.94A.030(10); *State v. Warnock*, 174 Wn.App. 608, 612, 299 P.3d 1173 (2013). Because this condition has no limits on what authority DOC may exercise, it is an overbroad and vague assertion of court control over Mr. Arroyo.

In *State v. McWilliams*, 177 Wn.App. 139, 154, 311 P.3d 584 (2013), the court added a notation to the defendant's sentence that he must also comply with further "conditions" set by DOC. The Court of Appeals affirmed that notation because it was not a new court-ordered condition, but merely a notice to the defendant that DOC may add conditions under its statutory authority.

Condition 2 is different and far broader than the notation in *McWilliams*. It is a court-order that Mr. Arroyo must comply with "all directions" of his CCO. It is not limited to authorized conditions added to community custody. It embraces any demand placed by any supervisory officer. It is not tethered to RCW 9.94A.703 or RCW 9.94A.704, which limit the conditions that may be imposed by the court or DOC. By statute, DOC's additional conditions must be "based on the risk to community safety," not merely an ad hoc decision by a CCO. RCW 9.94A.704.

As this Court recognized *State v. Magana*, 197 Wn.App. 189, 200, 389 P.3d 654 (2016), due process prohibits vague conditions of community custody. A community custody condition must “ (1) provide[] ordinary people with fair warning of the proscribed conduct, and (2) ha[ve] standards that are definite enough to ‘protect against arbitrary enforcement.’” *Id.* at 200-01. This condition affords impermissible discretion to the CCO and is susceptible to arbitrary enforcement. The CCO’s authority to create new “directions” for Mr. Arroyo is unlimited as written. It should be stricken. *Magana*, 197 Wn.App. at 201.

4. *Condition 9 impermissibly restricts Mr. Arroyo’s legitimate and supportive relationships with others.*

The prosecution implicitly concedes Condition 9 sweeps too broadly, without justification. It asserts the State may legitimately limit a person’s contacts with other criminal associates. Resp. Brief at 8. But Condition 9 is not limited to this type of association with known felons.

Condition 9 is prohibits Mr. Arroyo’s contacts with others in the community beyondthe interests the State asserts. It requires preapproval for any “associate” without explaining meaning of an “associate.” As written, it includes a causal contact or person connected to another

person. It further bars Mr. Arroyo from associating with any person he met in prison, not merely other prison inmates, and instead includes people he met in prison who try to help him re-enter the community or even a community custody officer.

Condition 9 is overbroad, as the State seems to concede. On remand, it should be modified to limit contact with “gang members or gang associations in the sense defined by RCW 9.94A.030(13), or to other specifically described persons having a direct relation to the circumstances of the crimes.” *State v. Weatherwax*, 193 Wn.App. 667, 681, 376 P.3d 1150 (2016), *rev. in part on other grounds*, 188 Wn.2d 139, 392 P.3d 1054 (2017).

5. Condition 13 contains an overbroad and unconstitutional restriction on access to the courts.

This condition forbids Mr. Arroyo from appearing “at any court proceeding” unless a party or subpoenaed as a witness.” CP 36.

The prosecution contends it may prohibit Mr. Arroyo’s access to the courts just as it may bar him from voting as a felon. But voting is a privilege of citizenship for adults, not a blanket constitutional right for any person as is the guarantee that justice in all cases be openly administered. Const. art. I, §10; U.S. Const. amend. I.

Any restriction on court access must be narrowly tailored, based on a compelling interest and the least restrictive means possible. *Waller v. Georgia*, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); see *State v. Lormor*, 172 Wn.2d 85, 92, 257 P.3d 624 (2011).

The court did not engage in the necessary fact-finding before imposing this condition. To prosecution's claimed interest in preventing Mr. Arroyo from seeking revenge on a witness could be addressed more narrowly, such as barring him from attending court proceedings that bear any relationship to gang-activity. Court closures must be based on individual circumstances with the reasons for removal articulated on the record. *Lormor*, 172 Wn.2d at 94-95. The court cannot issue blanket orders applying to any type of proceeding and any time. This broad condition should be stricken.

B. CONCLUSION.

For the forgoing reasons and those addressed in Appellant's Opening Brief, the challenged community custody conditions should be stricken.

DATED this 21st day of June 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'N. Collins', written in a cursive style.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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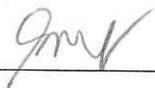
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)	
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)	
v.)	NO. 34593-9-III
)	
ROBERTO ARROYO,)	
)	
Appellant.)	

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