

NO. 34593-9-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ROBERTO ARROYO,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

As part of Roberto Arroyo's sentence, the court ordered multiple unduly vague and overbroad restrictions on his behavior. These impermissible conditions of community custody include the requirement that he comply with "all" unspecified commands of his community custody officer (CCO); obey the CCO's boundless authority to determine his "associates"; have no artwork that could be construed as graffiti; and never appear in open court proceedings as a witness or spectator. These unauthorized and unconstitutional conditions must be stricken.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously imposed community custody conditions that are impermissibly vague, overbroad, and not authorized by statute, in violation of the First and Fourteenth Amendments and article I, sections three and five of the Washington Constitution.

2. The court entered a community custody condition that violates Mr. Arroyo's right to attend open court proceedings and petition the government as protected by the First Amendment and article I, section ten.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

A court lacks authority to impose an illegal sentence, which is an error that may be raised at any time and includes unlawful community custody conditions. Here, the court imposed community custody conditions that are unauthorized by statute, impermissibly vague, or intrude upon constitutionally protected rights without being narrowly tailored to a legitimate government interest. Should this Court strike these community custody conditions?

D. STATEMENT OF THE CASE.

Leaving the Green Lantern Tavern one evening, Andres Solis was attacked by Emmanuel Pantaleon in the parking lot. CP 2. The two men fought and several others came to Mr. Pantaleon's aid, including Roberto Arroyo. *Id.*; 10/26/16RP 17. During the fight, Mr. Arroyo fired several shots from a gun, injuring Mr. Solis and killing Juan Martinez. CP 2. The purported motive for the fight was that Mr. Solis had testified against another person in a gang related homicide trial. CP 2..

Mr. Arroyo pled guilty to murder in the second degree and assault in the second degree with a firearm enhancement. CP 17; RP

17-18.<sup>1</sup> As part of the plea, Mr. Arroyo reserved the right to “make whatever recommendation they want pursuant to our negotiation” and did not agree to any particular sentencing terms. RP 4; CP 21.

At sentencing, Mr. Arroyo noted that a recent decision in *Weatherwax*<sup>2</sup> might affect the community custody conditions that were proposed. RP 21. The prosecution offered to strike conditions offered by the Department of Corrections to rectify the problem. *Id.* The court did not impose the list of conditions offered by the Department of Corrections. *Id.* It imposed a standard range sentence with community custody conditions set forth in the judgement and sentence and additional conditions listed in Appendix 4.3 of the judgement and sentence. CP 32-33, 35-37; RP 28.

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<sup>1</sup> The verbatim report of proceedings from the plea and sentencing hearings is contained in a single volume, referred to herein as “RP.” The restitution hearing is referred to by the date of proceeding.

<sup>2</sup> *State v. Weatherwax*, 193 Wn.App. 667, 677, 376 P.3d 1150, *rev. granted on other grounds*, 186 Wn.2d 1009 (2016).

E. ARGUMENT.

**The court ordered multiple overbroad, unduly vague, and unauthorized conditions of community custody.**

1. *Community custody conditions must be both constitutionally legitimate and authorized by statute.*

The court's authority to impose a sentence in a criminal case is strictly limited to that authorized by the legislature in the sentencing statutes. *State v. Johnson*, 180 Wn.App. 318, 325, 327 P.3d 704 (2014). Community custody conditions must be crime-related or otherwise permitted by statute. RCW 9.94A.505(8); RCW 9.94A.703; *see In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A condition is "crime-related" if it "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Community custody conditions must also comply with constitutional limitations. A restriction that impairs the exercise of constitutional rights during community custody must be "reasonably necessary to accomplish the essential needs of the state and the public order." *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). The condition must also be sufficiently definite so ordinary people to understand what conduct is illegal and it must have ascertainable

standards to protect against arbitrary enforcement. U.S. Const. amend. 14; Const. art. I, § 3; *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

When a community custody condition concerns material or behavior protected by the First Amendment, “a stricter standard of definiteness applies” because a vague standard may chill the legitimate exercise of First Amendment freedoms. *Bahl*, 164 Wn.2d at 753; U.S. Const. amend. 1; Const. art. I, § 5. It is manifestly unreasonable for a court to impose a community custody condition that impermissibly vague or improperly chills protected freedom of expression or association. *Id.*

A person convicted of a crime “always has standing to challenge his or her sentence on grounds of illegality,” including unlawful community custody conditions. *State v. Valencia*, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010); *Bahl*, 164 Wn.2d at 744.

2. *Condition 2 gives unbridled discretion to the CCO to add new “directions” with which Mr. Arroyo must comply.*

Condition 2 states: “You are to comply with all directions of your community corrections or probation officer.” CP 35.

This condition “does not place any limits on the ability of” Mr. Arroyo’s CCO to designate additional mandatory obligations. *State v. Magana*, 197 Wn.App. 189, \_ P.3d \_, 2016 WL 7377339, \*4 (2016). In *Magana*, this Court struck a community custody condition barring the defendant from going to “parks, schools, malls, family missions or establishments where children are known to congregate or other areas defined by supervising CCO.” *Id.* This condition was fatally flawed because it “affords too much discretion” to the assigned CCO and is “susceptible to arbitrary enforcement.” *Id.*

Similar to the condition stricken in *Magana*, Condition 2 enables an individual CCO to direct Mr. Arroyo to do any particular thing the CCO demands and makes it a violation of community custody should he fail to adequately comply. CP 35. It is not limited to complying with the conditions listed in the judgment and sentence. *Id.* This “boundless” requirement that Mr. Arroyo comply with unnamed

“directions” of a CCO is impermissibly vague and should be stricken.

*Magana*, at \*4.

3. *Condition 9 places unduly vague and constitutionally impermissible restrictions on Mr. Arroyo’s associations.*

Condition 9 states in part:

Your associates are to be approved by your community custody or probation officer. You are not to associate with anyone whom you have met while in the institution.

CP 36.

In *Weatherwax*, this Court addressed a community custody condition barring the defendant from having contact with “known felons or gang members or their associates.” 193 Wn.App. at 677. This Court deemed this condition “unconstitutionally vague.” *Id.*

Barring a person from associating with people who associate with gang members “sweeps too broadly.” *Id.* at 680, citing *United States v. Johnson*, 626 F.3d 1085, 1091 (9<sup>th</sup> Cir. 2010). It includes people “who may only have a social connection to an individual gang member” and could include a minister or a mere friend of a gang member, and even could extend to a probation officer. *Id.*

Condition 9 sweeps even broader. *Id.* As *Weatherwax* explains, permissible “[l]imits on association must be confined to 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.” *Id.* at 681.

Condition 9’s first sentence gives unbridled discretion to the CCO to approve all “associates.” CP 36. It places no limits on the CCO or context for Mr. Arroyo to know which associates would be permitted by any CCO, and is not confined to associates who are members of a criminal street gang. It also does not describe what it means to be an associate, and could include remote social connections or anyone with whom Mr. Arroyo has contact.

The second sentence bars association with any person “you have met while in the institution.” CP 36. It is not simply a prohibition on associating with convicted felons or other inmates. Rather, it covers pen pals, religious advisors, and community-oriented visitors to prison who offer re-entry assistance to those released into the community. It sweeps too broadly, chills the protected First Amendment freedom to peaceably associate with law-abiding citizens, and lacks the definiteness required of a restriction on protected First Amendment conduct. *See Bahl*, 164 Wn.2d at 753. It must be stricken.

4. *Condition 10 contains overbroad restrictions that include possession of basic cutlery like a butter knife or unknowing possession of such material by others.*

Condition 10 states:

You are not to possess weapons of any description including but not limited to firearms, knives of any description, and martial arts weaponry. You are not to possess ammunition or weapon replicas. You are not to remain in any vehicle wherein anyone possesses a weapon, ammunition, or weapon replica.

CP 36.

This condition defines “weapons” to include “knives of any description,” which bars the use of a butter spreader or plastic knife. It also bars Mr. Arroyo from being in a car where another person possesses such a plastic knife, even if he has no knowledge of this possession. Under this definition of prohibited weapons, a replica of a knife would be barred, no matter what material it is made of, including toys.

The definition of weapon is not limited to items that are actually or potentially dangerous. It invites arbitrary enforcement by an individual CCO who deems any household item to be a weapon, no matter how it was used. This condition must be stricken or modified to

prohibit only items that are per se weapons or used in a dangerous fashion.

5. *Condition 13 bars Mr. Arroyo from exercising his rights as a citizen.*

Condition 13 directs: “You are not to appear at any court proceeding unless you are a party, defendant in a criminal action, or subpoenaed as a witness.” CP 36.

Article I, section 10 grants all members of the public “the right to open and accessible court proceedings.” *State v. Beskurt*, 176 Wn.2d 441, 445, 293 P.3d 1159 (2013); Const. art. I, § 10. “[M]embers of the public and the press have a right to attend court proceedings.” *In re Recall Charges Against Seattle Sch. Dist. No. 1 Directors*, 162 Wn.2d 501, 508, 173 P.3d 265 (2007). “The federal right of petition includes a right to access the courts.” *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn.App. 41, 77, 316 P.3d 1119 (2014); U.S. Const. amend 1.

This restriction chills Mr. Arroyo’s constitutional right to access the courts or support another person who needs help from the court. It bars him from participating in a court proceeding as a voluntary witness or attending any matter of public concern that occurs in the courthouse.

This vague and overbroad prohibition denies Mr. Arroyo his basic rights of citizenship and is therefore manifestly unreasonable.

*6. Condition 14 is a vague and overbroad regulation of constitutionally protected speech involving graffiti.*

Condition 14 states, “You are not to possess graffiti in any form.” CP 36. This condition does not define “graffiti” and expressly sweeps broadly enough to prohibit it “in any form.”

The common definition of graffiti involves a drawing placed illicitly on public property. *See Merriam-Webster*, [www.merriam-webster.com](http://www.merriam-webster.com) (defining graffiti as: “usually unauthorized writing or drawing on a public surface”).

This commonly understood type of graffiti cannot be “possessed” because it is something written on a wall, sign, or other property in a public arena. Because graffiti is not typically possessed, it is unclear what condition 14 prohibits Mr. Arroyo from doing.

But graffiti is also a style of artwork, used in music albums, video games, clothing, and by corporate advertisers. *See, e.g., R. Kennedy*, “A Feast of Street Art, Luminous and Legal,” New York

Times (Aug. 29, 2013) (calling graffiti “a new American art form”).<sup>3</sup>

This type of graffiti can be possessed, but it is not necessarily nefarious and would fall within First Amendment protected speech. *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (“self-expression through painting constitutes expression protected by the First Amendment”); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 97-98 (2d Cir. 2006) (“graffiti items” have “predominantly expressive purpose” and restrictions on their sale must be narrowly tailored).

Notably, this condition does not pertain to gang-related graphic displays. Mr. Arroyo is separately prohibited from wearing, displaying or possessing “any insignia, emblem, button, badge” or article of clothing “which is evidence of affiliation” with the Westside 18<sup>th</sup> Street gang. CP 36 (condition 15). Because this other condition prohibits Mr. Arroyo from displaying gang affiliation on his body, it is hard to imagine what additional graffiti he could possess that would constitute a constitutionally permissible and statutorily crime-related restriction. The conduct targeted by condition 14 is unduly vague, subject to

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<sup>3</sup> Available at: <http://www.nytimes.com/2013/08/30/arts/design/graffiti-art-of-the-city-from-the-bronx-to-brooklyn.html> (last viewed Mar. 15, 2017).

unascertainable standards, and impermissibly intrudes upon material protected by the First Amendment. *See Bahl*, 164 Wn.2d at 753.

7. *This Court should strike the unauthorized conditions of community custody.*

These conditions of community custody are not constitutionally permissible, sufficiently narrowly drawn, or reasonably related to Mr. Arroyo's offense of conviction. This Court should vacate these unauthorized conditions of community custody. *Riles*, 135 Wn.2d at 353-53 (striking condition of community placement not reasonably related to offense and therefore not authorized by statute).

F. CONCLUSION.

The improperly ordered conditions of community custody must be stricken.

DATED this 16th day of March 2017.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 34593-9-III
v.	)	
	)	
ROBERTO ARROYO,	)	
	)	
Appellant.	)	

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