

34593-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO ARROYO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts some clarity may be required in two of the challenged community custody conditions.

III. ISSUE

Did the court abuse its discretion in imposing various conditions of community custody?

IV. STATEMENT OF THE CASE

The Defendant Roberto Arroyo was originally charged with murder in the first degree for the killing of Juan Pedro Martinez; assault in the first degree for the shooting of Andres Solis; and intimidating a witness that being Andres Solis who was a former witness in a proceeding. CP 9-10. The State file a notice of intent to allege and prove the offenses were committed with the intent to benefit a criminal street gang. CP 12-13.

The charges were amended for a change of plea. CP 14-16. The

Defendant pled guilty to murder in the second degree of Mr. Martinez and assault in the second degree with a firearm enhancement of Mr. Solis. CP 14-15, 17, 28. He accepted the police reports and statement of probable cause. CP 26.

There were four co-defendants named in this murder/assault: the Defendant, Emmanuel Arcenio Pantaleon, Birzavit Carmona-Hernandez, and Antonio Carmona-Hernandez. CP 8. The reports explain that Mr. Solis and Mr. Martinez were shot in a tavern parking lot on October 24, 2015. CP 2, 6. Mr. Martinez did not survive. CP 2, 6. Fearing retaliation against himself and his family, Mr. Solis reluctantly named the 18th Street gang members. CP 2, 6-7. He said the gang members approached the two men in the parking lot and called Mr. Solis a rat before shooting them. CP 2, 7. Mr. Solis believed the attack was retaliation for his having testified in the Benito Gomez trial. CP 2, 7. *State v. Gomez*, 183 Wn.2d 29, 31, 347 P.3d 876 (2015) (“fatally shot a rival gang member and fired his handgun at fleeing rivals and residents of a nearby apartment building”). *See also* Respondent’s Brief, *State v. Gomez*, 180 Wn. App. 1012 (2014) (State’s brief in the unpublished lower court decision – describing that 18th Street gang member Andres Solis and others testified against their own gang member Benito Gomez for the murder

of 13th Street gang member Julian Martinez). Mr. Solis described that the assailants jumped him and then shot him at close range before fleeing in a Chevy Trailblazer. CP 2, 7. The Defendant was captured on video both inside and outside of the tavern in the company of named assailants at the time of the assault, eyeing the victims. CP 2-3, 7-8. Two witnesses followed the four assailants and identified the Defendant and his group. CP 3, 8. All four are members of the local Westside 18th Street Wicked Gangsters gang. CP 4. Ms. Solis' testimony would be seen as a "betrayal [of] the gang's code of silence." CP 4, 8.

The Department of Corrections provided the sentencing court with a thorough pre-sentence investigation, after which additional conditions of sentence were drafted as a proposed appendix F (CP 138-39). CP 35-37, 124-39. At sentencing, defense challenged appendix F as being inconsistent with the State's proposed appendix 4.3. RP 21. The State responded by agreeing to withdraw appendix F. RP 21. The prosecutor explained, "we covered everything we wanted to cover in our proposed appendix [4.3]." RP 21. And defense responded, "That would resolve the problem." RP 21. The court's judgment includes no appendix F.

On appeal, the Defendant now challenges certain community custody

conditions in Appendix 4.3 of the judgment and sentence. CP 35-36. However, he fails to designate for appeal the investigation which recommended the conditions. The State has provided that record by supplemental designation.

V. ARGUMENT

The Defendant challenges community custody provisions 2, 9, 10, 13, and 14. The court's authority for imposing these conditions comes from RCW 9.94A.703.

The court "shall require the offender to comply with any conditions imposed by the department under RCW 9.94A.704." RCW 9.94A.703(1)(b). In setting conditions, the department performs a quasi-judicial function. RCW 9.94A.704(11). Conditions must be in writing. RCW 9.94A.704(7)(a). "The department shall assess the offender's risk of reoffense and may establish ... additional conditions of community custody based upon the risk to community safety." RCW 9.94A.704(2)(a). Those conditions may be requirements for "affirmative conduct. RCW 9.94A.704(4). "At a minimum" this means reporting to the CCO, abiding by geographical restrictions, notifying about address and employment changes, paying supervision fees, and disclosing mental health and chemical dependency

treatment. RCW 9.94A.704(3).

The court “may order an offender to ... perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d). The court “may order an offender to ... comply with any crime-related prohibition.” RCW 9.94A.703(3)(f).

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10).

A. THE COURT DID NOT ABUSE ITS DISCRETION IN MIRRORING THE LEGISLATIVE LANGUAGE REGARDING THE DEPARTMENT’S QUASI-JUDICIAL AUTHORITY TO SET SUPERVISORY CONDITIONS.

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

The Defendant complains that this restriction is impermissibly vague. He compares it to the condition discussed in *State v. Magana*, 197 Wn. App. 189, 389 P.3d 654, 660 (2016). There the court considered the prohibition against frequenting establishments where children are known to congregate or

other areas as defined by the community corrections officer. *State v. Magana*, 197 Wn. App. at 200.

The condition is more comparable to that in *State v. McWilliams*, 177 Wn. App. 139, 311 P.3d 584, 587–88 (2013). There the court simply ordered McWilliams to cooperate with the Department of Corrections. *State v. McWilliams*, 177 Wn. App. at 146. The court of appeals held that “the sentencing court properly delegated the specifics of McWilliams’ community custody conditions to the DOC.” *State v. McWilliams*, 177 Wn. App. at 154. The opinion notes that RCW 9.94A.704(2)(a) authorizes the DOC to establish and modify additional conditions of community custody based upon the risk to community safety. *Id.* The opinion also noted this delegation of the specifics of community custody conditions to the DOC was within the DOC’s authority as set forth in *Sansone*. *Id.*

While it is the function of the judiciary to determine guilt and impose sentences, the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.’ *State v. Sansone*, 127 Wash.App. 630, 642, 111 P.3d 1251 (2005) (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937)).

Id. The provision only repeats the legislative directive empowering the DOC to establish conditions.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A PROHIBITION AGAINST ASSOCIATING WITH OTHER FELONS.

CONDITION 9: *Your associates are to be approved by your community corrections or probation officer. You are not to associate with anyone whom you have met while in the institution. You are not to associate with any member of the Westside 18th Street gang or any other gang affiliated with the Westside 18th Street gang as directed by your community corrections or probation officer. CP 36.*

The Defendant challenges only the first two sentences, italicized above. The Defendant cites to *State v. Weatherwax*, 193 Wn. App. 667, 677–78, 376 P.3d 1150, 1155 (2016), *review granted on other grounds*, 186 Wn.2d 1009, 380 P.3d 490 (2016), *and rev'd*, 392 P.3d 1054 (Wash. 2017). There the defendant was not allowed “to have any association or contact with known felons or gang members *or their associates*.” *State v. Weatherwax*, 193 Wn. App. at 677. The opinion acknowledged that gang-related conditions are crime-related. *Id.* However, it required further clarity about the meaning of “associates,” noting that it could be defined by reference to RCW 9.94A.030(13). *State v. Weatherwax*, 193 Wn. App. at 681.

The Defendant argues that *Weatherwax* would forbid a condition against associating with ex-cons. However, the opinion reviewed the condition prohibiting association with “known felons” and only found the provision lacked clarity in its use of the term “gang associates.” Insofar as the opinion discusses known felons, i.e. the people the Defendant will be meeting in his 352 months of confinement, the opinion permits the condition.

Discouraging supervised offenders from associating with each other is a time-honored probationary practice designed to encourage compliance with the law by disrupting old associational patterns. *Cf. State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (prohibition against associating with other computer hackers is not an unconstitutional restriction but rather helps prevent Riley from further criminal conduct for the duration of his supervision).

C. IT IS APPROPRIATE TO CLARIFY CONDITION 10.

CONDITION 10: You are not to possess weapons of any description including by 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.

The State concedes that a prohibition against “knives of any description” is excessive. Washington laws already provide direction. RCW

9.41.250; RCW 9.41.270; RCW 9.41.280.

However, it is proper to prohibit the Defendant from being in a vehicle with a firearm or other dangerous weapon, properly defined. Insofar as the defendant has no knowledge of such weapon, he has a defense to an allegation of violation. *Cf. State v. Llamas-Villa*, 67 Wn.App. 448, 836 P.2d 239 (1992) (finding the condition prohibiting association with persons who used, possessed, or distributed controlled substances was not impermissibly vague, because if a violation was alleged, “he will have the opportunity to assert that he was not aware the individuals with whom he had associated were using, possessing, or dealing drugs.”).

D. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A REASONABLE, LIMITED, AND CRIME-RELATED PROHIBITION.

CONDITION 13: 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.

The Defendant was charged with intimidating a witness and convicted of assaulting a person who had testified against a fellow gang member at trial. This prohibition is plainly crime-related, not overbroad.

Insofar as the Defendant claims this condition “bars him from exercising his rights as a citizen,” that is the nature of criminal conviction. A

convicted person loses the right of association, the right to vote, the right to sit on a jury, the right to bear arms, etc. There is a process to restore one's civil rights, *after* a convicted person has fulfilled the conditions of probation and sentence and been discharged by the court. RCW 9.94A.637(5).

Because the Defendant's act intimidated others from seeking assistance of law enforcement and exercising their rights to access the courts, this complaint is not well-received. Because the restriction explicitly permits him access as a party or witness, the condition is reasonable.

E. THE INTENT OF CONDITION 14 IS SUFFICIENTLY REPRESENTED IN OTHER CONDITIONS.

CONDITION 14: You are not to possess graffiti in any form. CP 36.

The Defendant does not object to condition 15 which prohibits possessing or displaying gang insignia which evidences membership with the 18th Street gang. AOB at 12. However, the Defendant is concerned that artwork on music albums, video games, clothing, or by corporate advertisers may be considered a violation of community custody condition 9.

It is apparent that the Department's concern is the Defendant's gang affiliation. CP 134 (in 2010 "one of the most blatantly staunchest gang members I had ever interviewed"), 136 (killed a stranger four months after

his release from prison in order to back up a friend). And perhaps the Defendant shares this concern. CP 134 (wanting to tell his son not to become involved in a gang and that the signs/symbols of gang membership weren't "cool"). His extensive criminal history begins at the age of 11 and is intimately related to his gang associations. CP 126-32. The Defendant has been involved with the 18th Street gang in his early teens and became a member at 15. CP 134. Because the likely intent of the Department is covered in other conditions, the State does not object to striking this item.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: May 23, 2017.

Respectfully submitted:



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<p>Nancy P. Collins <nancy@washapp.org> <wapofficemail@washapp.org></p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 23, 2017, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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