

NO. 34958-6-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

ARISTEO GARCIA RUBIO, Appellant.

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BRIEF OF RESPONDENT

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CODEE L. MCDANIEL, WSBA #42045  
Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH A. BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

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**I. ASSIGNMENTS OF ERROR**

**A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR**

1. Whether the trial court properly imposed the costs of incarceration as a discretionary legal financial obligation?
2. Whether the condition of community custody requiring Garcia Rubio to register as a sex offender within 24 hours of release from incarceration conflicts with RCW 9A.44.130(4)(a)(i)?

**B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR**

1. The trial court properly imposed the costs of incarceration as a discretionary legal financial obligation.
2. The condition of community custody requiring Garcia Rubio to register as a sex offender within 24 hours of release from incarceration does not conflict with RCW 9A.44.130(4)(a)(i) and should be maintained.

**II. STATEMENT OF THE CASE**

The Appellant, Aristeo Garcia Rubio, was convicted of second degree rape of a child following a jury trial. Clerk's Papers (CP) at 86.

The jury also found that Garcia Rubio used his position of trust to facilitate the commission of the crime. CP at 87.

Testimony at trial revealed that Garcia Rubio befriended a sixth grade student named M.J.R.<sup>1</sup> during the 2013-2014 school year while he worked as a para-educator at Franklin Middle School in Yakima, Washington. Verbatim Report of Proceeding (VRP) 11/17/16 at 62; VRP 11/18/16 at 128-30. M.J.R was 12-years-old. VRP 11/18/16 at 129. Garcia Rubio's friendship with M.J.R started with him talking to her at school and walking her home from school. *Id.* at 132-33. During one of the times that Garcia Rubio walked M.J.R home from school, M.J.R's mom caught them together and contacted personnel at the Franklin Middle School because she was concerned about her daughter spending time with a much older man. *Id.* at 136. School personnel then ordered Garcia Rubio to stay away from M.J.R. *Id.*

Garcia Rubio did not stay away from M.J.R. *Id.* at 140. Instead, he invited M.J.R over to his house several times after school. *Id.* On one occasion, Garcia Rubio claimed that the woman's clothes M.J.R saw in the house were his female roommate's. *Id.* at 140. Garcia Rubio was actually married and the female roommate was his wife. *Id.* at 386. Another time at Garcia Rubio's house, Garcia Rubio pulled M.J.R onto his lap and kissed her on the lips. *Id.* at 143. Then, things between Garcia Rubio

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<sup>1</sup> Initials used to protect victim's privacy pursuant to Division III, General Order 2012 *In RE the Use of Initials or Pseudonyms for Child Victims or Witnesses.*

escalated to Garcia Rubio taking M.J.R.'s virginity in the bed he shared with his wife. *Id.* at 147-48, 246. M.J.R. described feeling immense pain when Garcia Rubio penetrated her. *Id.* at 149. On a scale of one-to-ten, M.J.R. described the pain as an eight or nine. *Id.* at 159.

When M.J.R. returned home after losing her virginity to Garcia Rubio, her mom confronted her and asked if she had been with the guy who walked her home from school the other day. *Id.* at 155, 246. M.J.R. told her mom that it was the same guy. *Id.* M.J.R.'s mom then called the police. *Id.*

When police arrived, M.J.R. told them that Garcia Rubio was the guy who walked her home from school and that Garcia Rubio had sex with her.

The State also presented evidence from David Strizke. *Id.* at 217. Strizke is a DNA forensic scientist with the Washington State Patrol Crime Laboratory. *Id.* He tested a black and white comforter from Garcia Rubio's bedroom and found Garcia Rubio's and M.J.R.'s DNA on it. *Id.* at 227, 232; *see also* SE 25.

On November 22, 2016, a jury convicted Garcia Rubio of second degree rape of a child. CP at 86. The jury also found that Garcia Rubio used his position of trust to facilitate the crime. *Id.* at 87.

A month later, Garcia Rubio was sentenced. *Id.* at 101. Garcia Rubio faced an indeterminate sentence of life with a minimum sentence of 78 to 102 months imprisonment. VRP 12/23/16 at 70. The State advocated for an exceptional sentence of 180-months based on the abuse of trust aggravator. *Id.* at 56. The defense argued for a sentence of 78-months. *Id.* at 68. The trial court granted the State's request for an exceptional sentence and sentenced Garcia Rubio to life with a minimum term of 120-months imprisonment and community custody pursuant to RCW 9.94A.507. *Id.* at 71-72; CP at 102-03. One of the terms of community custody imposed by the trial court required Garcia Rubio to register as a sex offender within 24 hours of release from incarceration. *Id.* at 103.

This timely appeal then followed.

### **III. ARGUMENT**

#### **A. THE CONDITION OF COMMUNITY CUSTODY REQUIRING GARCIA RUBIO TO REGISTER AS A SEX OFFENDER WITHIN 24 HOURS OF HIS RELEASE FROM INCARCERATION DOES NOT CONFLICT WITH RCW 9A.44.130 AND SHOULD BE MAINTAINED.**

Garcia Rubio alleges that the trial court erred when it required him to register within 24 hours of his release from incarceration as a condition

of community custody because he believes it conflicts with RCW 9A.44.130. *See* Br. of Appellant at 5.

A sentencing court has discretion to impose sentencing conditions including conditions of community custody. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The sentencing court may also order a defendant to comply with any crime-related prohibition as a term of community custody. RCW 9.94A.703(3)(f); RCW 9.94A.505(9). A “crime-related prohibition” is defined as “[a]n order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Courts have interpreted “directly related” to mean conditions that are “reasonably related” to the crime. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

Sentencing conditions and conditions of community custody are reviewed for an abuse of discretion. *Id.* A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.3d 1365 (1993). 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. *State v. Corona*, 164 Wn. App. 76, 78, 261 P.3d 680 (2011). Sentences that are unlawful may also be challenged for the

first time on appeal. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

In this case, Garcia Rubio did not challenge the condition of community custody below. VRP 12/23/16 at 76-77. He challenges it here and alleges that the trial court erred when it required him to register as a sex offender within 24 hours of being released from incarceration as a term of community custody. *See* Br. of Appellant at 5-6. Garcia Rubio was convicted of second degree rape of a child, which is a sex offense. *See* RCW 9.94A.030(47)(a)(i) (sex offense includes a felony that violates RCW 9A.44 other than RCW 9A.44.132); RCW 9A.44.128(10)(a) (sex offense is any offense defined as a sex offense by RCW 9.94A.030). Offenders like Garcia Rubio who have been convicted of a sex offense have a duty to register under RCW 9A.44.130. Because the crime that Garcia Rubio was convicted of is a class A sex offense, he has a duty to register as a sex offender for life under RCW 9A.44.140. *See* CP at 24. Therefore, the trial court's community custody condition that Garcia Rubio register as a sex offender is a crime-related condition under RCW 9.94A.030(10).

What remains then is whether the condition of community custody conflicts with RCW 9A.44.130. The sole focus of Garcia Rubio's challenge is the community custody condition ordering him to "[r]egister

as a sex offender as required by RCW 9A.44.130 within 24 hours of release from incarceration.” CP at 104. Garcia Rubio’s interpretation of RCW 9A.44.130 is flawed because it fails to take into account that the statute imposes two separate registration requirements upon his release from incarceration. The statute provides:

(i) OFFENDERS IN CUSTODY. Sex offenders or kidnapping offenders who are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, **must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender.** The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. **The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation.** The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

RCW 9A.44.130(4)(a)(i) (emphasis added).

Garcia Rubio’s interpretation of the statute completely ignores the requirement that the agency having jurisdiction over him communicate with the county sheriff of his anticipated residence. In no uncertain terms,

the legislature mandated that: “[t]he agency shall within three days forward the registration information to the county sheriff for the county of the offender’s anticipated release.” *Id.* The county sheriff would not necessarily have Garcia Rubio’s registration information until after he registered with the agency having jurisdiction over him following his release from incarceration. This, in turn, reinforces the rationale behind the legislature’s requirement that the agency having jurisdiction over an offender forward information to the county sheriff of the offender’s anticipated residence.

The Washington Supreme Court has already addressed the issue that Garcia Rubio complains of here. In *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007), the defendant had a duty to register as a sex offender based on a conviction for first degree child molestation. *Id.* at 2. The defendant violated the terms of his community custody and was sentenced to jail time as a sanction. *Id.* After the defendant was released from jail, he failed to register as a sex offender. *Id.* The court rejected the defendant’s argument that RCW 9A.44.130(4)(a)(i) was unconstitutionally vague. *Id.* at 6-8. The court held that “[i]t is clear from the statute that convicted sex offender must register upon release from custody, if they were in custody ‘as a result’ of the sex offense that triggered application of RCW 9A.44.130.” *Id.* at 8. The court further held that requiring sex

offenders to register their address when they are first released from incarceration serves the legislature's purpose of assisting law enforcement by keeping them informed of the whereabouts of sex offenders. *Id.* at 10 (citing *State v. Pay*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999)).

Accordingly, "just as local law enforcement needs to know when a sex offender moves to its community, it needs to know when a sex offender returns to the community." *Watson*, 160 Wn.2d at 11 (emphasis in original).

Garcia Rubio argues that the 24 hour qualifier in the condition of community custody contradicts the plain language of RCW 9A.44.130(4)(a)(i). *See* Br. of Appellant at 7. He argues that 24 hours is a "significantly shortened time frame" when compared to the statute. *Id.*

The term "at time of release" is not defined in RCW 9.94A.030. Courts have held that terms not statutorily defined are accorded their plain and ordinary meaning unless a contrary intent appears. *Spokane v. Fischer*, 110 Wn.2d 541, 543, 754 P.2d 1241 (1988) (citing *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987)); *see also Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007) (same). In cases such as this where the statute does not define the term in question, courts are permitted to consider the plain and ordinary meaning of the term according to a standard dictionary. *Bahl*, 164 Wn.2d

at 754. Inserting “the” after the word “at” helps narrow down the field of possible definitions that apply. The Merriam-Webster online dictionary defines “at the time of” as “when something happened.” *At the Time of*, MERRIAM-WEBSTER, (Sept. 11, 2017, 11:30 AM), <https://www.merriam-webster.com/dictionary/at%20the%20time>. It defines “time” as “the measured or measurable period during which an action, process, or condition exists or continues: duration.” *Time*, MERRIAM-WEBSTER, (Sept. 25, 2017, 8:45 AM), <https://www.merriam-webster.com/dictionary/time>. And the dictionary defines “release” as “to set free from restraint, confinement, or servitude.” *Release*, MERRIAM-WEBSTER, (Sept. 11, 2017, 11:35 AM), <https://www.merriam-webster.com/dictionary/release>. The ordinary meaning of the term “at time of release” then is when released from incarceration. As applied here, that means when an offender is released from incarceration, he or she must register as a sex offender with the agency having jurisdiction over him or her. *See* RCW 9A.44.130(4)(a)(i).

The 24 hour qualifier in the condition of community custody does not reduce the period of time that Garcia Rubio has to register as a sex offender because he is required to register as a sex offender “at time of release” from incarceration. The condition of community custody does not contradict the statute. Rather, it impresses upon Garcia Rubio the need

to register as a sex offender immediately upon his release from incarceration.

Garcia Rubio also alleges that he is confused as to whether the 24 hours applies to registration with the agency having jurisdiction over him or the county sheriff of the area where he intends to reside. *See* Br. of Appellant at 8. The community custody condition requires Garcia Rubio to “[r]egister as a sex offender as required by RCW 9A.44.130 within 24 hours of release from incarceration.” CP at 104.

The plain language of the statute dictates that Garcia Rubio must register at the time of his release from incarceration with the agency having jurisdiction over him and then Garcia Rubio “must also” register within three business days from the time of his release from incarceration with the county sheriff where he intends to live. A “business day” is defined as “any day other than Saturday, Sunday, or a legal local, state, or federal holiday.” RCW 9A.44.128(1). The legislature’s use of the words “must also” shows that it intended an offender to register both with the agency having jurisdiction over the offender and then with the county sheriff of the offender’s anticipated residence following the offender’s release from incarceration. RCW 9A.44.130(a)(4)(i).

The judgment and sentence also directs Garcia Rubio to RCW 9A.44.130. Section 5.7 of the judgment and sentence references RCW

9A.44.130. *See* CP at 107. That section specifically provides that “[t]he defendant must register immediately upon being sentenced unless he or she is in custody, in which case the defendant must register within 24 hours of release.” *Id.* The condition of community custody that Garcia Rubio challenges references the same statute. RCW 9A.44.130(4)(a)(i) clarifies that the 24 hour period applies to registration with the agency having jurisdiction over Garcia Rubio and not the county sheriff. Moreover, *Watson* makes clear that RCW 9A.44.130 survives a constitutional vagueness challenge. 160 Wn.2d at 12. Garcia Rubio’s argument is not compelling. The condition of community custody should therefore be maintained.

Assuming for sake of argument that the Court finds the condition of community custody objectionable, the Respondent agrees to modify the condition to state instead: register as a sex offender as required by RCW 9A.44.130 upon release from incarceration. Any reference to the 24 hour period would be stricken. By the same accord, Respondent would also agree to strike the 24 hour period from section 5.7 of the judgement and sentence. *See* CP at 107.

**B. THE TRIAL COURT PROPERLY IMPOSED THE COSTS OF INCARCERATION AS A DISCRETIONARY LEGAL FINANCIAL OBLIGATION AFTER THOROUGHLY INQUIRING INTO GARCIA RUBIO'S PRESENT AND FUTURE ABILITY TO PAY.**

Garcia Rubio alleges that the trial court violated *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) when it imposed the costs of incarceration as a discretionary legal financial obligation (LFO). *See* Br. of Appellant at 4-5. Both *Blazina* and RCW 10.01.160(3) require trial courts to assess a defendant's present and future ability to pay discretionary LFOs at sentencing. The extent of what is required in the trial court's "individualized inquiry" is disputed. *Blazina*, 182 Wn.2d at 838.

The *Blazina* Court recognized that "[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." 182 Wn.2d at 832. Here, counsel for Garcia Rubio asked the trial court to cap the costs of incarceration at \$300. VRP 12/23/16 at 75. The trial court did. *Id.* Now, Garcia Rubio challenges those costs. Garcia Rubio should not be allowed to challenge the costs of incarceration when he agreed to them being capped at \$300 below. *Id.*

In the event that this Court exercises discretionary review, the record demonstrates that the trial court properly assessed Garcia Rubio's current and future ability to pay the costs of incarceration.

Counsel for Garcia Rubio asked the court to strike the court-attorney attorney recoupment because he was retained and represented to the court that "the defendant was employed, but is no longer, and won't be employed for ten years." *Id.* at 74. Counsel for Garcia Rubio further asked the court to find that Garcia Rubio was indigent for purposes of appeal and to cap the costs of incarceration at \$300. *Id.* at 75. The court inquired if Garcia Rubio had any money to pay legal financial obligations at the time. *Id.* Garcia Rubio replied no. *Id.* The court then made a "finding of current indigency and a future inability to pay" and also granted Garcia Rubio's request to cap the costs of incarceration at \$300. *Id.*

Garcia Rubio should not now be allowed to challenge the costs of incarceration when he agreed to those costs below. However, while not conceding this issue, Respondent agrees to strike the costs of incarceration in order to avoid the continued costs of litigation in the event that the Court grants discretionary review.

**C. IN THE INTEREST OF JUDICIAL ECONOMY,  
RESPONDENT IS NOT SEEKING COSTS ON  
APPEAL EVEN IF IT IS PREVAILING PARTY.**

On July 5, 2017, Garcia Rubio filed a motion asking the Court to decline to impose appellate costs. *See* Appellant’s Motion to Decline Appellate Cost Award.

Courts have recognized that unless directed otherwise, “the party that substantially prevails on review” will be awarded appellate costs. RAP 14.2. The authority to award costs is permissive under RAP 14.2. It is within the Court’s discretion to decline to award costs at all. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In the event that Respondent prevails on appeal, Respondent is not seeking costs in the interest of judicial economy.

**IV. CONCLUSION**

The trial court properly ordered as a condition of community custody that Garcia Rubio register as a sex offender within 24 hours of his release from incarceration. The community custody condition does not conflict with RCW 9A.44.130, and should be maintained. In the event that the Court finds the condition objectionable, Respondent agrees to strike the reference to the 24 hour period in the condition of community custody and section 5.7 of the judgment and sentence. The trial court also properly imposed the costs of incarceration as a discretionary legal



DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on September 25, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Andrea Burkhardt at [andrea@burkhartandburkhart.com](mailto:andrea@burkhartandburkhart.com).

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

DATED this 25th day of September, 2017 at Yakima, Washington.

\_\_\_\_\_  
/s  
CODEE L. MCDANIEL  
WSBA # 42045  
Deputy Prosecuting Attorney  
Yakima County, Washington  
128 N. Second Street, Room 329  
Yakima, WA 98901  
Telephone: (509) 574-1210  
Fax: (509) 574-1211  
[codee.mcdaniel@co.yakima.wa.us](mailto:codee.mcdaniel@co.yakima.wa.us)

**YAKIMA COUNTY PROSECUTOR'S OFFICE**

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