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Consolidated with 35080-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DOMINIC CUDMORE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it found possession of a stolen access device and identity theft did not constitute the same criminal conduct for purposes of calculating Mr. Cudmore's offender score.
2. The community custody provision prohibiting "contact with DOC ID'd drug offenders except in [a] treatment setting" is vague and infringes on Mr. Cudmore's constitutional right to freedom of association. CP 41, 45; U.S. Const. amend. I.

II. ISSUES PRESENTED

1. Whether the sentencing court erred in determining that second degree possession of stolen property (access device) and second degree identity theft were not the same criminal conduct for purposes of Mr. Cudmore's offender score, where it was demonstrated the two crimes had different intents?
2. Whether the trial court erred in imposing a community custody provision prohibiting the defendant from any contact with DOC identified drug offenders except in a treatment setting?

III. STATEMENT OF THE CASE

On December 19, 2013, the defendant, Dominic Cudmore, entered a Drug Court agreement in the Spokane County Superior Court in case

number 2013-01-03078-1 on Count 2, second degree possession of stolen property; Count 3, second degree identity theft; and Count 4, first degree trafficking in stolen property. CP 1-2, 6-9.¹ Pursuant to this agreement, the State agreed to dismiss Count 1 of the information, first degree theft. CP 1, 10.

Contemporaneously, the defendant entered a drug court agreement for all three counts of Spokane County case number 2013-01-03813-8, which charged him with one count of first degree theft² and two counts of first degree trafficking in stolen property. CP 1-2, 5-8 (COA 350801).

On March 31, 2015, the defendant agreed to a transfer of his cases from Drug Court to Superior Court's Mental Health Court. CP 14-19. The defendant struggled to comply with the terms of the mental health court agreement. CP 20-21. The court terminated his involvement with Mental Health Court on December 6, 2016, because he failed to attend court

¹ Unless otherwise indicated, citations to the record or verbatim report of proceedings are taken from the clerk's papers and transcripts designated under COA 350797.

² This first degree theft was amended after revocation of the Drug Court/Mental Health Court agreement, but prior to sentencing, to third degree theft. CP 24 (COA 350801).

hearings, his repeated positive urinalysis/breath tests, and his inability to regularly participate in treatment, testing and review hearings.³ CP 22-23.

The defendant and his attorney stipulated to his prior criminal history. CP 24-27, 29. Excluding the defendant's current convictions, his offender score was "4." RP 82. Upon the revocation of the defendant's mental health court agreements, he was convicted of six felony offenses: one count of second degree possession of stolen property (access device), one count of second degree identity theft, and one count of first degree trafficking in stolen property, CP 35-36; two counts of first degree trafficking in stolen property under cause number 2013-01-03813-8, and one count of possession of a controlled substance under cause number 2013-01-03511-2, CP 36-37.

The defendant argued that two of his current offenses were the same criminal conduct, and, therefore, he was subject to an offender score of "8" rather than "9." CP 28-31; RP 81-82, 89. The State disagreed with this argument and presented reasons why the crimes of possession of a stolen access device and identity theft were not the same criminal conduct. RP 84-86; CP 32-34. The sentencing court agreed with the State's arguments and determined that "there is different criminal intent in each of the two charges;

³ The defendant's participation in both cases was terminated on the same date for the same reasons. CP 20-21 (COA 350801).

therefore, it is not the same criminal conduct and his offender score would be a nine.” RP 89.

Thereafter, the trial court sentenced the defendant to a prison-based Drug Offender Sentencing Alternative (DOSA). CP 39; CP 31 (COA 350801). The lengthiest of the defendant’s DOSA sentences was 36.75 months in prison (with 36.75 months on community custody) for the three counts of trafficking in stolen property. CP 39; CP 31 (COA 350801). The court imposed a 25-month prison sentence for the identity theft and 12.75-month prison sentence for possession of a stolen access device (along with respective 25-month and 12.75-month terms of community custody). CP 39. One of the court’s ordered community custody conditions was that the defendant have “no contact with DOC ID’d drug offenders except in treatment setting.” CP 41, 45; CP 33, 36 (COA 350801).

This appeal timely followed.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT POSSESSION OF STOLEN PROPERTY AND IDENTITY THEFT DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

1. Standard of Review.

A trial court’s determination of whether two crimes constitute same criminal conduct is a highly discretionary decision that is subject only to review for an abuse of discretion or misapplication of the law.

State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Mehrabian*, 175 Wn. App. 678, 710, 308 P.3d 660 (2013). A court abuses its discretion in determining that two crimes are not the same criminal conduct where the record supports only one conclusion; however, where the record adequately supports both the conclusion that the crimes were the same criminal conduct or were separate criminal conduct, the matter lies in the court's discretion. *Graciano*, 176 Wn.2d at 537-38.

2. Determination of Offender Score.

A defendant's offender score calculation "shall be determined by using all other current and prior convictions." RCW 9.94A.589(1)(a). A defendant may appeal a standard range sentence if the court failed to follow proper procedures, including determination of the offender score calculation. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999).

The defendant's prior criminal history was stipulated to by both the defendant and his attorney. CP 24-27, 29. Excluding the defendant's current convictions, his offender score, therefore, was "4." RP 82. On appeal, the defendant does not challenge that this prior criminal history is correct or that it does not count toward his offender score.

3. Defendant's Current Convictions.

The defendant challenges the manner in which the court counted his “current offenses.” Specifically, he alleges that the crimes of second degree possession of stolen property (access device) and second degree identity theft are the same criminal conduct for purposes of sentencing.

A criminal defendant has the burden of proving that current offenses constitute the same criminal conduct. *Graciano*, 176 Wn.2d at 539-40. Because the finding that two crimes constitute the same criminal conduct favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.* at 539.

The scheme – and the burden – could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

Id. at 540 (emphasis in original).

Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this context, “intent” does not mean the particular statutory mens rea required for the crime. *State v. Davis*,

174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012, 311 P.3d 26 (2013). Rather, it means the defendant’s “objective criminal purpose in committing the crime.” *Id.* at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030, 793 P.2d 976 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”)). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540 (citing *State v. Porter*, 133 Wn.2d at 181).

The two crimes for which Mr. Cudmore was convicted do not share the same intent. Identity theft requires “the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). Possession of stolen property requires knowledge that the property possessed is stolen and to withhold it from the true owner. RCW 9A.56.140. Thus, identity theft requires the intent to use the stolen property to further another crime; here, that crime would be theft. Possession of stolen property simply requires that the person know that he

or she is in possession of a stolen access device and have the intent to withhold it from the true owner – it does not require an intent to use the stolen property for any specific purpose, including theft.

This was substantially the State’s argument below:

The defendant committed the crime of Second Degree Possession of Stolen Property once he took possession of the stolen access device. The State would not need to present any evidence at trial as to why the defendant possessed the access device. The mere act of possession constitutes the crime. In order to commit the crime of Identity Theft in the Second Degree, the defendant’s objective criminal intent changed to possessing the access device with intent to commit another crime...

CP 33.

The trial court agreed with this analysis. Because the objective criminal intent of the crimes is not the same, and the same criminal conduct rule is narrowly construed, it cannot be said that the trial court abused its discretion in determining that the two offenses were not the same criminal conduct.

B. THE TRIAL COURT DID NOT ERR IN IMPOSING RESTRICTIONS ON ASSOCIATION WITH DOC IDENTIFIED DRUG OFFENDERS WHILE THE DEFENDANT WAS SUPERVISED ON COMMUNITY CUSTODY.

1. Standard of Review.

The court reviews community custody conditions for an abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). The abuse of discretion standard applies whether this court is reviewing a crime-

related community custody condition or reviewing a community custody condition for vagueness. *See id.* at 652, 656; *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposing an unconstitutional condition is always an abuse of discretion. *Irwin*, 191 Wn. App. at 652. Defendants may generally challenge community custody conditions that are contrary to statutory authority for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

2. Restriction on Freedom of Association.

The Sentencing Reform Act permits the court to impose crime-related prohibitions as a part of a sentence. RCW 9.94A.505(8). It allows the sentencing court to impose community placement conditions prohibiting contact with a “specified class of individuals.” RCW 9.94A.703(3)(b); RCW 9.94A.660. “An offender’s usual constitutional rights during community placement are subject to SRA-authorized infringements.” *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006) (citing *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1988)). Freedom of association may be restricted “if imposed sensitively and if the restriction is reasonably necessary to accomplish the essential needs of the state and public order.” *Hearn*, 131 Wn. App. at 607 (citing *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993), and *State v. Ancira*, 107 Wn. App. 650, 654,

27 P.3d 1246 (2001)). Crime related prohibitions will be reversed only if “manifestly unreasonable.” *Id.* (citing *Riley*, 121 Wn.2d at 37).

In *Riley*, our Supreme Court upheld a sentencing condition that prohibited a convicted computer hacker from owning a computer, associating with other computer hackers, and communicating on computer bulletin boards. The Supreme Court held that these conditions would help prevent the offender from committing further criminal conduct and were reasonably crime related as a means of discouraging communication with other computer hackers. Ultimately, the Supreme Court determined that those provisions were not an unconstitutional restriction on the defendant’s freedom of association.

In *Hearn*, the defendant contended that a community placement provision mandating that she “refrain from associating with known drug offenders” was unconstitutional. Relying on *Riley*, this Court determined that the restriction on Ms. Hearn’s ability to associate with known drug offenders was not an unconstitutional restriction on her freedom of association.

As in *Hearn*, Mr. Cudmore contends that the restriction on associating with DOC identified drug offenders violates his first amendment right of free association. The defendant’s status as a convicted felon, however, provides the constitutional justification for imposing

reasonable restrictions such as this. Under *Riley* and *Hearn*, it is permissible to restrict defendant's contact with a class of individuals who engage in behavior similar to his crime.

The trial court's order was reasonable. The defendant was a repeat offender. He had an offender score of 9. The trial court determined that chemical dependency contributed to his offenses. CP 36. The court's limitation of the defendant's association with others who have drug histories was a reasonable approach that was intended to assist the defendant in maintaining sobriety from drugs once he is released from prison. There was no abuse of discretion in imposing this condition, especially where *Hearn* expressly states that a trial court may order such a condition without offending the First Amendment.

3. The Community Custody Term Is Not Unconstitutionally Vague.

"The due process vagueness doctrine under the Fourteenth Amendment ... requires that citizens have fair warning of proscribed conduct." *Bahl*, 164 Wn.2d at 752. The purpose of the vagueness doctrine is to ensure criminal offenses are defined "with sufficient definiteness that ordinary people can understand what conduct is proscribed," and to "provide ascertainable standards of guilt to protect against arbitrary enforcement." *Id.* at 752-53 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). Because violations of

community custody conditions subject a person to arrest and incarceration, vagueness prohibitions extend to community custody provisions. *Sanchez Valencia*, 169 Wn.2d at 791-92.

In deciding whether a term is unconstitutionally vague, the terms are not considered in a “vacuum,” rather, they are considered in the context in which they are used. [*State v. Douglass*, 115 Wn.2d at 180, 795 P.2d 693. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *State v. Sullivan*, 143 Wn.2d 162, 184–85, 19 P.3d 1012 (2001); see also *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 315, 53 P.3d 993 (2002); *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1080 (4th Cir.2006). If “persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” *Douglass*, 115 Wn.2d at 179, 795 P.2d 693.

Bahl, 164 Wn.2d at 754.

The defendant contends that the restriction on his association with “DOC ID’d drug offenders” is unconstitutionally vague. He contends the term is vague because the condition does not dictate how DOC determines who are drug offenders, set forth the criteria delineating drug offenders, or provide “whether when or how Mr. Cudmore will be informed who DOC considers to be a drug offender.” Appellant’s Br. at 15. Although the defendant claims that this language does not provide fair warning of the proscribed conduct, the language is clear – the defendant may not have contact with any DOC identified drug offender. Ultimately, it is irrelevant

whether the defendant *knows* another individual has been determined by DOC to be a drug offender because at a revocation hearing, the burden of proof would be on the State to prove a knowing violation.

For instance, in *State v. Llamas-Villa*, 67 Wn. App. 448, 455, 836 P.2d 239 (1992), the defendant challenged a similar community custody provision imposed under former RCW 9.94A.120(8)(c)(ii). In *Llamas-Villa*, the court rejected the defendant's contention that the condition should have been limited to association with individuals Llamas-Villa *knew* to use, possess, or deal with controlled substances, stating that the former statute, RCW 9.94A.120(8)(c)(ii) was not limited to "prohibit[ing] contact with a specified class of individuals ... whom the offender knows belong to the class." *Id.* at 455. Similarly, the current statute, RCW 9.94A.703(3)(b), is not limited to individuals known to the defendant to belong to the specific prohibited class. Also, as in *Llamas-Villa*, the defendant would have the opportunity to demonstrate at a violation hearing that he did not know he was associating with a DOC identified drug offender. *Llamas-Villa*, 67 Wn. App. at 455.

Additionally, the level of subjectivity required to understand "DOC identified drug offenders" is minimal. "DOC identified" means a person identified by the Department of Corrections to be a drug offender. The court should note that the condition does not permit the level of subjectivity the

defendant fears will lead to arbitrary enforcement – it does not permit a community custody officer to make this designation. Rather, it must be made pursuant to the Department of Corrections, a state agency governed by statutes and administrative code provisions.

The term “offender” is defined by state law. An “offender” is a person who (1) has committed a felony by state law and is eighteen years of age or older or less than eighteen years of age but whose case is under superior court jurisdiction, or otherwise falls within RCW 9.94A.030(35) or (2) is who is subject to the jurisdiction of the Department of Corrections, WAC 137-104-020. The term “drug” modifies “offender,” and therefore, the person must be an “offender” for an offense listed in RCW 9.94A.030(22) or offenders subject to a drug offender sentencing alternative. RCW 9.94A.030(22); RCW 9.94A.660. Certainly, the Department of Corrections does not arbitrarily determine that the offenders it supervises are “drug offenders;” that determination must be made based on each offender’s crime(s) of conviction.

None of these terms is considered in a “vacuum.” They must be considered in the context in which they are used and afforded their plain, ordinary meaning. Engaging in that analysis, a person of common intelligence would understand the condition to prohibit Mr. Cudmore from association with any person, identified by the Department of Corrections

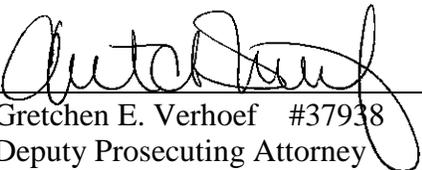
who has been convicted of a drug offense or serving a DOSA sentence. The sentencing condition is sufficient to place a reasonable person on notice of what conduct is prohibited and to prevent arbitrary enforcement. *See State v. Riles*, 86 Wn. App. 10, 18, 936 P.2d 11 (1997).

V. CONCLUSION

The sentencing court did not abuse its discretion in determining the crimes of second degree possession of stolen property (access device) and second degree identity theft do not constitute the same criminal conduct for purposes of calculating the defendant's offender score. The community custody provision prohibiting the defendant from contact with DOC identified drug offenders does not offend the First Amendment and is not unconstitutionally vague. The State respectfully requests this Court affirm the lower court and judgment and sentence.

Dated this 30 day of November, 2017.

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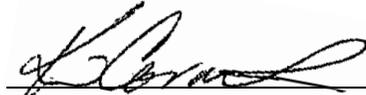
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I certify under penalty of perjury under the laws of the State of Washington, that on November 30, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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SPOKANE COUNTY PROSECUTOR

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