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NO. 35546-2-III
35971-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

PEGGY KNOTT,
Appellant.

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

Klickitat County Cause No. 17-1-00004-5

The Honorable Randall C. Krog, Judge

AMENDED BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Knott was deprived of her Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
2. Defense counsel provided ineffective assistance by failing to argue at resentencing that the mitigating factor at RCW 9.94A.535(1)(g) applied to Ms. Knott's case.
3. Ms. Knott's case must be remanded for resentencing.

ISSUE 1: Defense counsel provides ineffective assistance by failing to properly raise applicable mitigating factors at sentencing. Did Ms. Knott's attorney provide ineffective assistance of counsel at her resentencing by failing to raise that the "multiple offense policy" at RCW 9.94A.535(1)(g) counseled in favor of leniency in her sentence?

4. The sentencing court erred by entering a condition of Ms. Knott's sentence requiring her to "not associate nor have contact with persons with felony convictions, except as approved by the Department."
5. The sentencing condition requiring Ms. Knott to "not associate nor have contact with persons with felony convictions, except as approved by the Department" is unconstitutionally vague in violations of her Fourteenth Amendment right to due process.
6. The sentencing condition requiring Ms. Knott to "not associate nor have contact with persons with felony convictions, except as approved by the Department" is unconstitutionally vague in violations of her First and Fourteenth Amendment right to Freedom of Association.

ISSUE 2: A sentencing condition is unconstitutionally vague if it fails to provide fair notice of the proscribed conduct or to protect against arbitrary enforcement. Is the condition of Ms. Knott's sentence requiring her to "not associate nor have contact with persons with felony convictions" unconstitutionally vague when it does nothing to clarify what is meant by "associate" or "contact" and also does not specify whether Ms. Knott must be aware of the person's felony conviction?

7. The court erred by entering a finding that Ms. Knott had the means to pay the cost of her incarceration. CP 155.

8. The court exceeded its statutory authority by ordering Ms. Knott to contribute to the cost of her incarceration.
9. The court lacked authority to order Ms. Knott to pay the cost of her incarceration under RCW 9.94A760(2) because she does not have the current ability to pay those costs.

ISSUE 3: A sentencing court may order a person to contribute to the costs of his/her incarceration only when s/he has the ability to pay those costs “at the time of sentencing.” Did the court exceed its authority by ordering Ms. Knott to contribute to the cost of her incarceration when she does not have the present ability to pay?

SUPPLEMENTAL STATEMENT OF FACTS

Ms. Knott was convicted of two counts of possession of a controlled substance with intent to deliver (PWID), one count of simple possession, and three counts of delivery of a controlled substance after a bench trial in August 2017. *See* RP 8/24/17. The three delivery charges were based on a series of “controlled buys” by a single police informant, within a two-week period. *See* RP (8/24/17) 117-77.

In August 2017, the court sentenced Ms. Knott to the statutory maximum of ten years, imposing five school bus stop enhancements consecutively to one another. RP (9/5/17) 279; CP 111-12.

After Ms. Knott was sentenced, the Department of Corrections (DOC) sent a letter to the prosecutor and defense counsel pointing out that school bus stop enhancements cannot be run consecutively to one another, except in the case of an exceptional sentence. CP 130. The prosecutor filed a motion for Ms. Knott to be transported back to the trial court for resentencing, which was granted. CP 129-30.

The trial court held a new sentencing hearing in October 2017. *See* RP (10/16/17); RP (10/19/17). The resentencing court imposed a standard-range sentence and ran the school zone enhancements concurrently. CP 151-52.

Ms. Knott's attorney did not argue at the hearing that the "multiple offense policy" mitigating factor applied to the case. *See* RP (10/16/17); RP (10/19/17).

Like at the original sentencing hearing, the court did not conduct any inquiry at the resentencing hearing into Ms. Knott's ability to pay legal financial obligations (LFOs). *See* RP (9/5/17); RP (10/16/17); RP (10/19/17).

But the court entered a finding that Ms. Knott had the present means to contribute to the cost of her incarceration and ordered her to do so. CP 155.

The resentencing court entered a condition of Ms. Knott's sentence, requiring that she: "not associate nor have contact with persons with felony convictions, except as approved by the Department." CP 153.

The resentencing hearing occurred while Ms. Knott's appeal of her original sentence was pending. Ms. Knott moved the court of appeals for permission to supplement the appellate record with the materials from the resentencing hearing. Motion to File Supplemental Statement of Arrangements and Amended Opening Brief (2/2/18).

A commissioner of the court of appeals granted the trial court *nunc pro tunc* approval to enter the amended Judgment and Sentence, which Ms. Knott then appealed. Commissioner's Ruling (3/20/18). The appeal of

the resentencing was consolidated with Ms. Knott's original appeal.

Ruling (4/18/18).

ARGUMENT

I. MS. KNOTT'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER RESENTENCING HEARING BY FAILING TO ARGUE A PROPER BASIS FOR A REDUCED SENTENCE.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177, 180 (2009). The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*¹

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). This includes a duty to investigate and

¹ Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

In Washington, a sentencing judge may impose a prison term below the standard range if “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive...” RCW 9.94A.535(1)(g). This mitigating factor applies when multiple delivery convictions result from a series of police-initiated controlled buys. *State v. Sanchez*, 69 Wn. App. 255, 263, 848 P.2d 208 (1993); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234 (1994). Under such circumstances, the court’s role

is to focus on the difference, if any, between the effects of the first controlled buy and the cumulative effects of subsequent controlled buys. Where that difference is nonexistent, trivial or trifling, there is a basis in law for an exceptional sentence downward.

Hortman, 76 Wn. App at 461.²

Defense counsel’s failure to seek an exceptional sentence on these grounds deprives the accused person of the effective assistance of counsel. *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002).³ In *McGill*, the defendant was convicted of three counts of delivery, following a series of police-initiated controlled buys. *Id.* at 98. He appealed his standard range sentence, arguing that defense counsel was ineffective for failing to

² *See also State v. Fitch*, 78 Wn. App. 546, 897 P.2d 424 (1995); *State v. Bridges*, 104 Wn. App. 98, 15 P.3d 1047 (2001).

request an exceptional sentence under *Sanchez*. *Id.* at 100. The Court of Appeals held that the defendant had been deprived of effective assistance at sentencing, vacated the defendant's sentence, and remanded for a new sentencing hearing. *Id.* at 101.

In this case, as in *McGill*, Ms. Knott was convicted of three counts of delivery, based on three police-initiated controlled buys. All three deliveries were for the same substance (methamphetamine); all three related to the same confidential informant; all three occurred within a two-week period. *See* RP (9/5/17) 279; CP 111-12. Under these circumstances, her attorney should have argued that police action artificially raised her offender score and made her seem more culpable than an offender convicted of only one count of delivery.

The police could have arrested Ms. Knott after the first delivery. This would have resulted in only one delivery conviction. By delaying her arrest and initiating two more deliveries, the police artificially produced two more offenses.

Under these circumstances, counsel should have asked the court to impose an exceptional sentence below the standard range or, at least, argued the "multiple offense policy" as a basis for a sentence at the low end of the standard range. *McGill*, 112 Wn. App. at 100-101. The effects

of the second and third deliveries were trivial, given the harm caused by the first delivery. *Hortman*, 76 Wn. App at 461.

Had the resentencing judged viewed counts two and three through the lens of *Sanchez*, he might well have imposed an exceptional sentence below the standard range or, at least, a sentence at the low end of the standard range. *McGill*, 112 Wn. App. at 100-101. Ms. Knott was denied the effective assistance of counsel at resentencing. Her sentence must be vacated and the case remanded to the trial court for a new sentencing hearing. *Id.*

II. THE SENTENCING CONDITION PROHIBITING MS. KNOTT FROM “ASSOCIATE[ING] [OR] HAV[ING] CONTACT WITH PERSONS WITH FELONY CONVICTIONS” IS UNCONSTITUTIONALLY VAGUE.

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09.

A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.³

The vagueness doctrine applies to sentencing and community custody conditions. *See e.g. State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). A sentencing condition is unconstitutionally vague if either it does not ensure that "citizens have fair warning of proscribed conduct" or if it permits for arbitrary enforcement. *Id.* at 791.

There is no presumption in favor of the constitutionality of a community custody condition. *Id.* at 792-93. Community custody conditions are subject to reversal when they are manifestly unreasonable. *Id.* The imposition of an unconstitutionally vague condition is *ipso facto* manifestly unreasonable. *Id.* at 792.

When a sentencing condition "concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms." *State v. Bahl*, 164

³ A constitutional vagueness challenge can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); RAP 2.5(a)(3). Constitutional issues are reviewed *de novo*. *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017).

Wn.2d 739, 753, 193 P.3d 678 (2008) (*citing Grayned*, 408 U.S. 104); U.S. Const. Amend. I, XIV. For this reason, a heightened level of clarity is demanded. *Id.* “[R]estrictions implicating First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order.” *Id.*

In Ms. Knott’s case, the court entered a sentencing condition prohibiting her from “associate[ing] [or] hav[ing] contact with persons with felony convictions, except as approved by the Department.” CP 153. But the court does nothing to clarify what would qualify as association or contact. CP 153. Accordingly, it is unknown whether Mr. Knott would be subject to penalty, for example, for engaging in a transaction with a store clerk, having an online conversation, participating in substance abuse treatment, working alongside, or attending a political meeting involving with someone with a felony conviction.

The sentencing court also does not specify whether Ms. Knott could be penalized even if she was not aware of an associate or contact’s felony conviction. RP 153.

The language of the sentencing condition is too vague to provide Ms. Knott with ascertainable notice of the proscribed conduct or to prevent arbitrary enforcement. *Goguen*, 415 U.S. at 578.

This extremely broad restriction upon Ms. Knott’s Freedom of Association also implicates the First Amendment. Accordingly, it must be struck unless it is “clear” and “reasonably necessary to accomplish essential state needs and public order.” *Bahl*, 164 Wn.2d at 753. But there is no reasonable public safety reason for prohibiting Ms. Knott from passing interactions with people with felony convictions, particularly when she may not even know of the conviction. The broad and vague prohibition of Mr. Knott from associating with anyone with a prior felony conviction fails to comply with this stricter First Amendment scrutiny. *Id.*

The sentencing condition requiring Ms. Knott “not associate nor have contact with persons with felony convictions, except as approved by the Department” is unconstitutionally vague. CP 153; *Id.* The condition must be stricken from her Judgment and Sentence. *Id.*

III. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ORDERING MS. KNOTT TO PAY THE COST OF HER INCARCERATION WITHOUT FIRST DETERMINING WHETHER SHE HAD THE CURRENT ABILITY TO PAY.

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).

A sentencing court may only order a person to pay the cost of his/her incarceration upon finding that s/he “at the time of sentencing, has the means to pay the cost of incarceration.” RCW 9.94A.760(2) (emphasis added). The plain language of the statute permits the court to require payment of incarceration costs only of someone who has the current ability to pay. RCW 9.94A.760(2).

This requirement stands in contrast to that regarding other LFOs, of which the court may order payment as long as the person “is or will be able to pay them.” RCW 10.01.160(3). This language – which applies to all LFOs except for costs of incarceration – permits an order of payment even if the accused cannot pay at the time of sentencing but will be able to pay at some future date. RCW 10.01.160(3).

Here, the court did not conduct any inquiry into Ms. Knott’s current financial situation at either her original sentencing hearing or at her resentencing. RP (9/5/17) 267-83; RP (10/16/17) 3019; RP (10/19/17) 20-48. Even so, the court ordered her to pay the cost of her incarceration. CP 155.⁴

The court exceeded its statutory authority by ordering Ms. Knott to contribute to the cost of her incarceration when she did not have the means

⁴ The sentencing court entered a boilerplate finding that Ms. Knott had the present means to pay the cost of incarceration. CP 155. That finding is not based on any evidence and must be vacated.

to do so at the time of sentencing. RCW 9.94A.760(2); *Hathaway*, 161 Wn. App. at 651-653. The order that Ms. Knott contribute to the cost of her incarceration must be vacated. *Id.*

CONCLUSION

Ms. Knott received ineffective assistance of counsel at her resentencing hearing. The trial court erred by ordering her not to “associate with” or “have contact with” anyone with a felony conviction because that sentencing condition is unconstitutionally vague and is not crime-related. The resentencing court exceeded its statutory authority by ordering Ms. Knott to contribute to the cost of her incarceration. Ms. Knott’s sentence must be vacated and her case must be remanded for resentencing.

Respectfully submitted on May 29, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Opening Brief, postage prepaid, to:

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I filed the Appellant's Amended Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on May 29, 2018.



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