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Court of Appeals
Division III
State of Washington

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

NO. 355462

STATE OF WASHINGTON,

Respondent,

v.

PEGGY KNOTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00004-5

BRIEF OF RESPONDENT

DAVID QUESNEL
DAVID WALL
Klickitat County Prosecuting Attorney's
Office
205 S. Columbus Avenue, MS-CH-18
Goldendale, Washington 98620
(509) 773 – 5838

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A. ISSUE PRESENTED

1. Was Defense counsel ineffective for failing to request an exceptional sentence?
2. Was the sentencing condition imposed by the court unconstitutionally vague?
3. When the box requiring payment of incarceration costs was checked, but the condition was not ordered, is it an error?

B. FACTS RELEVANT TO APPEAL

In October 2017, the Trial Court resentenced the defendant for two counts of possession of a controlled substance with intent to deliver, one count of possession of a controlled substance, and three counts of delivery of a controlled substance. RP (10-16-2017); RP (10-19-2017). Additionally, five of the six counts included school zone enhancements. RP (10-16-2017); RP (10-19-2017). With the exception of Count II, which had a standard range of 6+-12 months, the other five counts has a standard range of 20+-60 months. At the sentencing hearing the Court imposed a standard range sentence with the school zone enhancements to be served concurrently. Specifically, the Court imposed a mid-range sentence of 48 months with the additional sentence enhancement of 24 months for a total of 72 months confinement. CP 151-52. The Court also imposed a condition of community custody which required the defendant “not associate nor have contact with persons with felony convictions, except as approved by the

Department.” CP 153. Finally, it appears the box requiring the defendant to contribute to the costs of her incarceration was checked but no rate of payment per day was ordered in this section of the Judgment and Sentence. CP 155.

C. ARGUMENT

1. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST AN EXCEPTIONAL SENTENCE.

The defendant received a standard range sentence but claims her trial counsel’s failure to ask for an exceptional sentence was ineffective. The defendant is merely applying hindsight and a “what if” to counsel’s performance. There is nothing which would suggest that her trial counsel’s performance was unreasonable or that she has suffered any prejudice such that her sentence would have been different.

Court’s review an ineffective assistance of counsel claim de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). The defendant has the burden of establishing ineffective assistance of counsel. *State v. Humphries*, 181 Wn.2d 708, 719-720, 336 P.3d 1121 (2014). To prevail, a defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different." *Id.* at 720 (citing *Strickland v. Washington*, 466 U.S. 668, 687-

88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To prevail on a claim of ineffective assistance of counsel, the petitioner must overcome a strong presumption that defense counsel was effective. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. “Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers’ decisions with the benefit of hindsight.” *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir.1974)); see also *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (argument that counsel could have done a better job is inadequate to demonstrate ineffective assistance of counsel).

In this case, there is no reason to believe the trial court was unaware of its discretion to impose an exceptional sentence downward. The trial court did not indicate a willingness to impose a lower sentence. To the contrary, the trial court rejected the State’s request for what it considered an exceptional sentence up and rejected defendant’s request for a reduced sentence down through the drug offender sentencing alternative or the parenting sentencing alternative. RP (10-19-2017). In doing so, the trial court made clear its belief that defendant’s actions involving multiple sales of controlled substances, the presence of her children, and the defendant’s

unlawful use of controlled substances during her pre-trial release merited a standard range sentence. RP (10-19-20117). In light of this, and without hindsight and second guessing, it seems a stretch to claim trial counsel's failure to ask for an exceptional sentence downward fell below an objective standard of reasonableness.

Courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The presumption is rebutted if there is no possible tactical explanation for counsel's action. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Legitimate trial tactics or strategy cannot form the basis for an ineffective assistance of counsel claim. *State v. Garrett*, [327 P.3d 680] 124 Wn.2d 504, 520, 881 P.2d 185 (1994). To establish deficient performance, the defendant must show that trial counsel's performance fell "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; see also *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) (discussing development of a more objective standard akin to that used in legal malpractice cases). Courts evaluate the reasonableness of a particular action by examining the circumstances at the time of the act. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct

from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To establish prejudice in a penalty phase, defendant must show that "there is a reasonable probability that, absent the errors, the sentence ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; see also *In re Pers. Restraint of Davis*, 152 Wn.2d at 702.

In light of the tone and tenor of the sentencing hearing, a failure to seek a downward exceptional sentence by trial counsel cannot be said to fall below an objective level of reasonableness. Moreover the unsupported assertion that the sentencing judge "might well have imposed an exceptional sentence below the standard range or, at least, a sentence at the low end of the standard range" does not establish prejudice. See *Amended Brief of Appellant* p. 8. The defendant was given a mid-range standard sentence with an additional enhancement for committing this crime within a school zone and defendant has failed to articulate how such a sentence is prejudicial beyond speculation, conjecture and hindsight.

2. THE SENTENCING CONDITION IMPOSED BY THE COURT IS NOT UNCONSTITUTIONALLY VAGUE.

The defendant, as part of her 12 months of community custody was ordered "not associate nor have contact with persons with felony convictions, except as approved by the Department." CP 153.

A criminal defendant's constitutional rights during community placement are subject to the infringements authorized by the Sentence Reform Act (RCW 9.94A). The sentencing court has discretion to impose conditions on community custody that relate to the crime or attendant circumstances. In turn, as part of any sentence, the court may impose and enforce crime related prohibitions and affirmative conditions as provided in Chapter 9.94A RCW.

"The courts strive to protect freedom of speech, religion and racial equality, but freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order." *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974). But "[n]o causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime." *Williams*, 157 Wn.App. at 691-92 (citing *State v. Llamas-Villa*, 67 Wn.App. 448, 456, 836 P.2d 239 (1992)). Court's reviews sentencing conditions for abuse of discretion. *State v. Crockett*, 118 Wn. App. 853, 856, 78 P.3d 658 (2003). This court "reverse[s] only if the decision is manifestly unreasonable or... based on untenable grounds." *Williams*, 157 Wn.App. at 691.

The defendant claims the condition of not associating with convicted felons subject to Department of Correction approval is vague. A

defendant may assert a vagueness challenge to a condition of community custody for the first time on appeal. *State v. Bahl*, 137 Wn. App. 709, 745, 159 P.3d 416 (2007), reversed on other grounds, 164 Wn.2d 739, 193 P.3d 678 (2008).

“[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *Id.* at 752. This assures that ordinary people can understand what is and is not allowed and are protected against arbitrary enforcement of the laws. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010).

Community custody conditions are reviewed for 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 being unconstitutionally overbroad or vague. See *Irwin*, 191 Wn. App. at 652, 656; *Sanchez Valencia*, 169 Wn.2d at 791-92 (vagueness); *State v. Cordero*, 170 Wn. App. 351, 373, 284 P.3d 773 (2012) (crime related); *State v. Bahl*, 137 Wn. App. at 714-15.

The defendant asserts that the condition is invalid because it is not narrowly drawn and therefore vague. She asserts that the condition would only achieve the purposes for which it was imposed if it were limited to

individuals whom defendant knows to be felons. This ignores the fact that if the defendant is arrested for violating the condition, she will have an opportunity to assert that she was not aware that the individuals with whom she had associated were convicted felons.

The guarantee of due process contained in the Fourteenth Amendment to the United States Constitution and article 1, section 3 of the Washington Constitution requires that laws not be vague. *Irwin*, 191 Wn. App. at 652; *Bahl*, 164 Wn.2d at 752-53. A community custody condition is not vague so long as it: (1) provides ordinary people with fair warning of the proscribed conduct, and (2) has standards that are definite enough to “protect against arbitrary enforcement.” See *Bahl*, 164 Wn.2d at 752-53, (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A trial court has discretion to impose community custody conditions, but it is an improper exercise of this discretion, however, to impose an unconstitutionally vague condition. *Sanchez Valencia*, 169 Wn.2d at 791-793.

The Sentencing Reform Act permits the court to impose crime-related prohibitions as a part of a sentence. 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*, supra, 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*, supra, 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*, defendant contends that the restriction on associating with DOC identified convicted felons 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 her crime.

The trial court's order was reasonable. The defendant was convicted of six felony crimes and five special allegations, while she had no prior criminal convictions her current convictions indicated she had become involved in the drug culture and chemical dependency contributed to her offenses. The court's limitation of the defendant's association with others who have been convicted of felonies was a reasonable approach that was intended to assist the defendant in maintaining sobriety from drugs once she is released from prison and avoiding individuals who may tempt her into additional criminal activity. 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.

Ultimately, it is irrelevant whether the defendant knows another individual has been convicted of a felony because at any revocation hearing, the burden of proof would be on the State to prove a knowing violation. The court imposed condition should not be considered in a vacuum. It must be considered in the context in which it is used and afforded its plain, ordinary meaning. Engaging in that analysis, a person of common intelligence would understand the condition to prohibit defendant from association with any person who has been convicted of a felony. This sentencing condition will only be required for twelve months after her release and will assist her in maintaining a law abiding lifestyle. Further, the provision 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).

3. WHILE THE BOX REQUIRING PAYMENT OF INCARCERATION COSTS WAS CHECKED, IT DOES NOT APPEAR THAT THIS CONDITION WAS ACTUALLY ORDERED.

The defendant is correct that page 7 of the October 19, 2017, judgment and sentence appears to require the defendant to pay the cost of her incarceration, it is also clear that the court, as required, did not set a payment rate per day. It appears that this box was checked inadvertently. As defendant has pointed out, there was no inquiry into her ability to pay,

nor can the State locate any portion in the transcript where the sentencing court specifically ordered the defendant to pay the costs of her incarceration. The box requiring payment of incarceration costs appears to have been checked inadvertently.

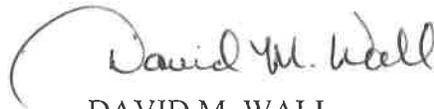
Since the amount of payment allegedly due pursuant to this order is not included in the Judgment and Sentence, the State believes any attempt at enforcement would be unenforceable. Moreover, it is not the practice of the Klickitat County Prosecutor or the Klickitat County Superior Court to order defendant's to pay toward their incarceration.

In light of these considerations the State will defer to this Court to determine the appropriate remedy.

D. CONCLUSION

Based on the arguments presented above, the State asks that the relief requested by defendant be denied.

Respectfully submitted this 13th day of August, 2018.



DAVID M. WALL
W.S.B.A. No. 16463
Chief Deputy Prosecuting Attorney

KLICKITAT COUNTY PROSECUTOR'S OFFICE

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