

FILED
Court of Appeals
Division III
State of Washington
4/10/2018 1:44 PM

NO. 35613-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JULIAN GARCIA,

Appellant.

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

The Honorable John W. Lohrmann, Judge
The Honorable Brandon Johnson, Judge Pro Tem

REPLY BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ISSUES IN REPLY</u>	1
B. <u>ARGUMENT IN REPLY</u>	1
1. THE COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH PROBATIONERS AND PAROLEES IS NOT CRIME-RELATED AND SHOULD BE STRICKEN.....	1
2. THE COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH PROBATIONERS AND PAROLEES IS NOT NARROWLY TAILORED TO PROTECT GARCIA’S CONSTITUTIONAL RIGHTS. ...	3
3. THE CONDITION REQUIRING GARCIA TO OBTAIN A CHEMICAL DEPENDENCY ASSESSMENT WAS NOT AUTHORIZED BECAUSE THE TRIAL COURT DID NOT MAKE THE STATUTORILY REQUIRED FINDING.....	8
C. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>First United Methodist Church v. Hr’g Exam’r for Seattle Landmarks Preservation Bd.</u> , 129 Wn.2d 238, 916 P.2d 374 (1996)	6
<u>In re Pers. Restraint of Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	6
<u>State v. Acevedo</u> 159 Wn. App. 221, 248 P.3d 526 (2010).....	3
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	1, 6
<u>State v. Bobenhouse</u> 143 Wn. App. 315, 177 P.3d 209 (2008) <u>aff’d</u> , 166 Wn.2d 881, 214 P.3d 907 (2009).....	3
<u>State v. Dickerson</u> noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016)	5
<u>State v. Dossantos</u> noted at 200 Wn. App. 1049, 2017 WL 4271713 6 (2017) <u>review denied</u> , 413 P.3d 9 (2018)	9
<u>State v. Irwin</u> 191 Wn. App. 644, 364 P.3d 830 (2015).....	6
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	8
<u>State v. Llamas-Villa</u> 67 Wn. App. 448, 836 P.2d 239 (1992).....	2, 3
<u>State v. Munoz-Rivera</u> 190 Wn. App. 870, 361 P.3d 182 (2015).....	2

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Richard Garcia</u> noted at 199 Wn. App. 103, 2017 WL 2602583 (2017) <u>review denied</u> , 189 Wn.2d 1032 (2018)	9
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	1, 2, 3
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	2, 6
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	6

FEDERAL CASES

<u>United States v. Caravayo</u> 809 F.3d 269 (5th Cir. 2015)	7
<u>United States v. Shull</u> 793 F. Supp. 2d 1048 (S.D. Ohio 2011)	4

RULES, STATUTES AND OTHER AUTHORITIES

GR 14.1	9
RCW 9.94A.703	2
U.S. CONST. Amend. I	1, 5, 7
U.S. CONST. Amend. XIV	5

A. ISSUES IN REPLY

1. Under the Sentencing Reform Act, must a community custody condition prohibiting association with certain individuals be crime-related?

2. Because such a prohibition affects the First Amendment right of association, must the State prove that such a restriction on association is narrowly tailored to serve its aims?

3. Where the trial court did not make a statutorily required finding, must the condition requiring Garcia to obtain a chemical dependency assessment be stricken as well?

B. ARGUMENT IN REPLY

1. THE COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH PROBATIONERS AND PAROLEES IS NOT CRIME-RELATED AND SHOULD BE STRICKEN.

The community custody condition prohibiting contact with probationers and parolees is not crime-related and should be stricken.¹ CP 29.

Ignoring more general legal principles, the State argues that State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), abrogated on other

¹ As stated in the Brief of Appellant, Garcia may challenge this condition for the first time on appeal. BOA at 4 (citing State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)). The State has not argued to the contrary.

grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010), has no application to this case because the underlying crimes were different than in this case. Brief of Respondent (BOR) at 5-6.

In State v. Munoz-Rivera, 190 Wn. App. 870, 892-93, 361 P.3d 182 (2015), this Court held, based on Riles, that a prohibition like the one in this case must be crime-related before it may be imposed. In Munoz-Rivera, the defendant challenged the community custody condition that he “shall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered.” Munoz-Rivera, 190 Wn. App. 870, 892-93. Notwithstanding RCW 9.94A.703(3)(b),² “such a condition, prohibiting contact with a ‘specified class of individuals’ must be crime related.” Munoz-Rivera, 190 Wn. App. at 893 (quoting Riles, 135 Wn.2d 326 at 50). The State cites Munoz-Rivera in its brief, but fails to mention this portion of the opinion. BOR at 12.

The State also cites State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992); State v. Bobenhouse, 143 Wn. App. 315, 332, 177

² Under RCW 9.94A.703(3)(b), “[a]s part of any term of community custody, the court may order an offender to . . . [r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals[.]”

P.3d 209, 217 (2008), aff'd, 166 Wn.2d 881, 214 P.3d 907 (2009); and State v. Acevedo, 159 Wn. App. 221, 233, 248 P.3d 526 (2010) in support of its argument that the condition at issue need not be crime-related. BOR at 5.

These cases do not provide support for the State's position. Llamas-Villa and Bobenhouse—which simply relies on Llamas-Villa—are addressed in Garcia's opening brief. Brief of Appellant (BOA) at 7, 7 n. 1. Acevedo cites the statutory language without analysis and ignores Riles.

For the reasons stated in Garcia's opening brief, the challenged condition should be stricken because the State failed to show it was crime-related.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH PROBATIONERS AND PAROLEES IS NOT NARROWLY TAILORED TO PROTECT GARCIA'S CONSTITUTIONAL RIGHTS.

The community custody condition prohibiting Garcia from having contact with probationers and parolees is not narrowly tailored to honor Garcia's constitutional rights to free speech and association. The condition should be stricken for this reason, as well.

The State's argument to the contrary contains several flaws. BOR at 6-10. First, the State argues that the community custody condition prohibiting contact is appropriately tailored because the facts suggest that Garcia might be negatively influenced by people who have committed

certain crimes. BOR at 10 (“The [12] month period of supervision should limit his association with a class of persons who are being supervised for commission of similar criminal acts.”). Rather than supporting the State’s position, this line of argument highlights a serious problem with the condition: As written, there is no limitation on the sort of probationers or parolees Garcia may associate with.

As indicated in its brief, moreover, State appears to believe that Garcia would benefit from drug treatment. BOR at 10-12. But probationers and parolees are likely to be among individuals participating in drug treatment in any given setting.³ As written, the prohibition would allow

³ As succinctly explained by one federal court:

As part of [the “War on Drugs”] campaign, federal and state officials amended sentencing policies, adopted “tough on crime” legislation, and introduced harsh mandatory minimums. . . . Concomitant with the ratcheting up of penalties for drug offenders, Congress limited judicial discretion in sentencing. The confluence of these two trends has resulted in massive growth in incarceration that bears little correlation to crime rates. . . .

Over the past thirty years, the adult prison population in the United States has skyrocketed from around 300,000 to 2.3 million—it is now the largest prison population in the world This increase—in both State and Federal prisons—is mostly due to the rise of imprisoned drug offenders.

United States v. Shull, 793 F. Supp. 2d 1048, 1052 (S.D. Ohio 2011) (citations omitted).

Garcia's community custody officer find Garcia in violation of his community custody conditions for attending, for example, a Narcotics Anonymous meeting, or for seeking support from a mentor with a criminal history. Perhaps the State would argue this is not the kind of association it wishes to curtail. If that is so, however, the existing condition does not say so. As written, Garcia is subject to the whims of his community corrections officer about whom he may and may not associate with, to Garcia's detriment. This situation cannot be permitted to persist.

Finally, the State erects a straw man by citing State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016), a case involving a challenge to a community condition explicitly involving romantic relationships. Because, according to this Court, such relationships were protected by the Fourteenth Amendment, rather than the First Amendment, this Court rejected Dickerson's overbreadth challenge. Id. at 3.

It should be noted that Garcia has not challenged a condition requiring prior approval of romantic relationships. Rather, Garcia has challenged a broader condition on First Amendment grounds. BOA at 10-12. The State cannot of its own will convert Garcia's challenge to one it believes is easier to defeat.

But, meanwhile, the State argues that Garcia’s challenge is too “vague.”⁴ BOR at 8. And while the imposition of crime-related prohibitions is generally reviewed for abuse of discretion, appellate courts review more carefully conditions that interfere with a fundamental constitutional right. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Crime-related prohibitions affecting fundamental rights must be narrowly drawn. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940, 948 (2008); see also United States v. Caravayo, 809 F.3d 269,

⁴ To the extent that the State is arguing that the issue is not ripe, this claim should also be rejected. Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. Sanchez Valencia, 169 Wn.2d at 787. Such challenges are ripe for review “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” Id. at 786 (internal quotation marks omitted) (quoting State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting First United Methodist Church v. Hr’g Exam’r for Seattle Landmarks Preservation Bd., 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996))).

Garcia’s challenge meets these requirements. First, the issue is one of law—the question is whether the community custody condition is appropriately tailored to the serve an interest identified by the State. Sanchez Valencia, 169 Wn.2d at 788. Second, the question does not require development of additional facts. The condition is tailored to the crime, or it is not, and Garcia is at present subject to the condition. Third, the challenged condition is final because the trial court sentenced Garcia to abide by it. See id. at 789 (“The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue.”).

Garcia’s pre-enforcement challenge to the community custody condition is, therefore, ripe for review. State v. Irwin, 191 Wn. App. 644, 651-52, 364 P.3d 830 (2015).

274-76 (5th Cir. 2015) (under the federal sentencing scheme, to survive a First Amendment challenge, special conditions of supervised release “must be tailored to the individual defendant and may not be based on boilerplate conditions imposed as a matter of course”).

The absence of information in the record showing a connection between association with probationers and parolees, and the crimes at issue, indicates the *State* has not met its burden to appropriately tailor a condition affecting a fundamental right.

In addition, the cases cited by the State at pages 8 and 9 of its brief are readily distinguishable, as they involve specific, demonstrably crime-related prohibitions.

This Court should reject the State’s “bizarro world”⁵-like attempt to improperly shift its burden to Mr. Garcia.

⁵ According to the TV Tropes website

A bizarro world is distinct from a normal Alternate Universe in that a bizarro world has everything “reversed” in some way. Heroes are villains and vice versa; beauty is hated and ugliness embraced. A good/evil flip is the usual trope, allowing the heroes to work together with the bizarro version of their enemies (who are, of course, heroes in bizarro world).

<http://tvtropes.org/pmwiki/pmwiki.php/Main/BizarroUniverse> (last accessed Apr. 2, 2018).

3. THE CONDITION REQUIRING GARCIA TO OBTAIN A CHEMICAL DEPENDENCY ASSESSMENT WAS NOT AUTHORIZED BECAUSE THE TRIAL COURT DID NOT MAKE THE STATUTORILY REQUIRED FINDING.

The condition requiring Garcia to obtain a chemical dependency assessment was not authorized in this case because the court did not make the statutorily required finding.⁶ CP 26, 29

But the State fails even to mention the statutory requirement in its briefing. The cases relied on by the State are cited out of context and do not mention the statutory requirement. BOR at pages iii, 10-12.

Indeed, State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), relied on by the State, actually stands for the proposition that such a statutory finding is required. There, the Court reversed an order requiring the defendant to participate in mental health treatment because the trial court failed to make the statutorily required findings. Id. at 209-10; see also State v. Dossantos, noted at 200 Wn. App. 1049, 2017 WL 4271713, at *6 (2017) (unpublished opinion stating that “because the trial court failed to make the requiring finding under former RCW 9.94A.607(1), it lacked authority to

⁶ The State is correct that it was Mr. Garcia who primarily addressed the sentencing court regarding drug treatment, after his attorney asked the court’s permission to let him speak. RP 15-16; see BOR at 3 n. 1. Mr. Garcia correctly pointed out that the police report in this case does not mention drug use. RP 15-16.

impose these conditions”), review denied, 413 P.3d 9 (2018); State v. Richard Garcia, noted at 199 Wn. App. 103, 2017 WL 2602583, at *10-11 (2017) (“in the absence of evidence or a finding that substance abuse was *directly related* to the circumstances of Mr. Garcia’s crimes, the trial court lacked authority to require substance abuse treatment as a community custody condition”), review denied, 189 Wn.2d 1032 (2018).⁷

In summary, the State’s briefing ignores the statutory requirement, and its argument should be rejected.

C. CONCLUSION

For the reasons stated above and in the opening brief, the challenged conditions should be stricken.

DATED this 10th day of April, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorney for Appellant

⁷ Under GR 14.1, Garcia respectfully cites these unpublished decisions as nonbinding authority, to be accorded such persuasive value as this Court deems appropriate.

NIELSEN, BROMAN & KOCH P.L.L.C.

April 10, 2018 - 1:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35613-2
Appellate Court Case Title: State of Washington v. Julian Jesus Garcia
Superior Court Case Number: 17-1-00293-1

The following documents have been uploaded:

- 356132_Briefs_20180410134417D3249629_4030.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 35613-2-III.pdf

A copy of the uploaded files will be sent to:

- jnagle@co.walla-walla.wa.us
- tchen@co.franklin.wa.us

Comments:

Client address is unknown at this time

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180410134417D3249629