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NO. 35613-2-III

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

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it entered a community custody condition prohibiting contact with individuals on probation or parole.

2. The sentencing court erred when it ordered the appellant to obtain a chemical dependency assessment and comply with recommendations.

Issues Pertaining to Assignments of Error

1. The community custody condition prohibiting contact with probationers and parolees is not crime-related, nor is it narrowly tailored to protect the appellant's constitutional rights to free speech and association under the First Amendment. Should the condition, therefore, be stricken?

2. Where the trial court made no finding that the appellant has a chemical dependency that contributed to his offenses, should the condition that he obtain a chemical dependency assessment be stricken as well?

B. STATEMENT OF THE CASE

1. Charges, amended charges, and plea

The State charged Julian Garcia with two counts of second degree assault – domestic violence and one count of interfering with the reporting of domestic violence. CP 4-6. The charges arose from altercation occurring

between Garcia, his mother, and his brother, with whom Garcia lived at the time of the incident. CP 1-3.

Garcia ultimately pleaded guilty to one count of third degree assault – domestic violence (mother) and one count of fourth degree assault – domestic violence (brother). CP 7-20; see also RCW 9A.36.031(1)(d) (third degree assault); RCW 9A.36.041 (fourth degree assault, a gross misdemeanor); RCW 10.99.020 (defining crimes of domestic violence as certain crimes when committed against household members).

2. Sentence

A sentencing hearing occurred on September 18, 2017. The court sentenced Garcia to 37 days of incarceration on each charge, to run concurrently. CP 25.

The court also sentenced Garcia to 12 months of community custody on count 1. CP 25; see RCW 9.94A.702(1)(c) (for offenders sentenced to one year or less confinement, court may impose up to 12 months of community custody for “crimes against persons” under RCW 9.94A.411(2)).

The court imposed \$800 in mandatory fines and also prohibited Garcia from having contact with his mother and brother for one year from the date of sentencing. CP 23, 26.

3. Challenged community custody conditions

At sentencing, the State urged the court to order drug treatment. RP 15. The prosecutor believed the offenses would not have occurred but for Garcia's substance abuse, and he noted that Garcia was facing charges involving methamphetamine in another case. RP 16.

In response, Garcia's attorney argued the underlying incident did not involve drug use, the police reports did not mention drug use, and that Garcia had remained sober. RP 15-16; see also CP 1-3 (probable cause statement incorporating police report, which contains no mention of drugs or drug use).

As to the State's request, the court did not make any related oral finding. RP 17-18. Also, the court did not check the box corresponding to preprinted language that "[t]he court finds that the defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607." CP 21.

The judgment and sentence nonetheless incorporates a community custody condition that Garcia "obtain a chemical dependency assessment and comply with all recommendations." CP 29 (condition 11).

Among several community custody conditions, the court also ordered that Garcia "not associate with any individuals who are on probation or parole or any person his probation officer or the court

specifically restricts him from associating with, namely[.]” CP 29 (condition 7). No name is specified. CP 29.

Garcia timely appeals. CP 36-37.

C. ARGUMENT

1. THE CONDITION PROHIBITING GARCIA FROM ASSOCIATING WITH PROBATIONERS AND PAROLEES SHOULD BE STRICKEN BECAUSE IT IS NOT CRIME-RELATED AND IT IS UNCONSTITUTIONAL.

The condition prohibiting association with individuals on probation or parole is unauthorized. It is not crime-related. The condition also violates Garcia’s constitutional rights to free speech and to association. Because the condition is invalid, it should be stricken.

- a. Authority for imposition of community custody conditions and standard of review

Erroneous or illegal sentences, including unauthorized community custody conditions, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

The trial court’s authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. As a condition of community custody, the trial 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.” RCW 9.94A.703(3)(b). A court may impose other “crime-related prohibitions” beyond those specifically listed. RCW 9.94A.703(3)(f).

Under RCW 9.94A.505(9), the trial court may also impose “crime-related prohibitions” as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009). Such prohibitions may include “an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be *directly* related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

Thus, crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn.

App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Whether the trial court has statutory authority to impose specific community custody conditions is a question of law that this Court reviews de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The imposition of crime-related prohibitions is, however, generally reviewed for abuse of discretion. In re Pers. Restraint of, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

But appellate courts review more carefully conditions that interfere with a fundamental constitutional right. Id. Because prohibiting contact with certain individuals implicates a person's constitutional rights to free speech and freedom of association, "Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime." Warren, 165 Wn.2d at 33.

A sentencing court necessarily abuses its discretion by violating an accused's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. A court likewise abuses its discretion when its decision is based on incorrect legal analysis or an erroneous view of the law. State v. Torres, 198 Wn. App. 685, 689, 393 P.3d 894 (2017). Community custody

conditions are, moreover, subject to reversal when they are manifestly unreasonable. Sanchez Valencia, 169 Wn.2d at 791-92.

b. The condition prohibiting association with probationers and parolees is not crime-related.

First, the condition prohibiting Garcia from associating with individuals on probation or parole must be stricken because it is not crime-related.

For a community custody condition such as this one to be upheld, there must be some evidence supporting a nexus between the crime and the condition in question. State v. Norris, ___ Wn. App. ___, 404 P.3d 83, 89 (2017) (citing State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008)).

As a preliminary matter, Garcia acknowledges that another division of this Court has stated, in the past, that a restriction on an offender’s freedom of association need not be crime-related. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). The case continues to be cited by courts of this state for this proposition.¹ Yet, in this respect, the case has been overruled.

¹ For example, this Court cited Llamas-Villa with approval in State v. Bobenhouse, 143 Wn. App. 315, 332, 177 P.3d 209, 217 (2008), aff’d, 166 Wn.2d 881, 214 P.3d 907 (2009). The Supreme Court, while affirming, did not address the proposition for which Llamas-Villa was cited. Bobenhouse, 166 Wn.2d 881.

In Llamas-Villa, a defendant convicted of possession of cocaine with intent to deliver challenged a condition forbidding association with individuals who use, possess, or deal controlled substances. Id. at 449, 454.

Division One of this Court rejected the argument, stating first that

[w]e . . . reject Llamas’s assertion that the condition is invalid because it is not crime-related. *There is no statutory requirement that a special community placement condition imposed under [former] RCW 9.94A.120(8)(c) [*, allowing condition that “[t]he offender . . . not have direct or indirect contact with the victim of the crime or a specified class of individuals,”²*] be crime-related.*

Llamas-Villa, 67 Wn. App. at 456 (emphasis added). The statutory language cited by the Court is the language now found in RCW 9.94A.703(3)(b), set forth above.

Yet, in upholding the condition, the Court nonetheless went on to explain that the prohibition was, in fact, crime-related. Llamas-Villa, 67 Wn. App. at 456 (holding prohibition valid because associating with such individuals was “conduct intrinsic to the crime for which Llamas was convicted”).

Llamas-Villa predates the Supreme Court’s decision in State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), abrogated on other

² This is the language now found in RCW 9.94A.703(3)(b), cited above.

grounds by Sanchez Valencia, 169 Wn.2d 782. And Riles overruled Llamas-Villa and controls the result in this case.

In Riles, petitioner Gholston was convicted of raping a 19-year-old woman. But the trial court prohibited him from having unauthorized contact with minors. Id. at 349.

Reversing the Court of Appeals, which had relied on Llamas-Villa,³ the Supreme Court held the statutory authority to prohibit contact with a specified class of individuals did not justify prohibiting Gholston from contacting minors, where the victim was an adult. Riles, 135 Wn.2d at 352-53. The Court noted that “[former] RCW 9.94A.120(9)(c)(ii) gives courts authority to order offenders to have no contact with victims or a ‘specified class of individuals.’ *The ‘specified class of individuals’ seems in context to require some relationship to the crime.*” Riles, 135 Wn.2d at 350 (emphasis added).

Again, the statutory language cited by the Riles Court is the language now found in RCW 9.94A.703(3)(b), and the same language at issue in Llamas-Villa.

Following Riles, it is clear that a prohibition on contact with a specified class of individuals must, in fact, relate to the crime in question.

³ State v. Gholston, noted at 86 Wn. App. 1028, 1997 WL 288938, at *4 (1997).

And here, there record reveals no connection between (1) the circumstances of the underlying crimes and (2) association with probationers or parolees. According to the probable cause statement, the charges resulted from a family argument that turned violent. The record contains no hint that any association with probationers or parolees contributed to the altercation.

For this reason alone, the condition should be stricken. Norris, 404 P.3d at 98 (striking community custody condition where there was no evidence that condition was “reasonably related to the circumstances of the crime”).

c. The condition is also unconstitutional.

Under Riles, the condition must be stricken as unrelated to the circumstances of the crime. But the condition is also unconstitutional under the First Amendment. The trial court’s order prohibiting Garcia from associating with any probationers and parolees is so broad as to bear no reasonable relation to the goal of promoting safety and public order. CP 29. The condition is, therefore, unconstitutional, and must be stricken for this reason as well.

Careful review of sentencing conditions—even more so than in the typical case—is required where those conditions interfere with the fundamental constitutional right of an accused. Riles, 135 Wn.2d at 347.

Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. Id. Additionally, conditions that interfere with fundamental rights must be sensitively imposed. Bahl, 164 Wn.2d at 757; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

This Court's decision in State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006), while affirming a condition, is consistent with these principles. There, this Court, considering a constitutional challenge, affirmed the condition that an offender convicted of methamphetamine possession refrain from associating with known drug offenders. This Court reasoned "[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders." Id. at 609.

Hearn illustrates that conditions affecting association must, at a minimum, bear some reasonable relation to the criminal activity at issue or the class of individuals targeted and/or affected by the crimes. When they do not, however, they fail to promote public order and result in pointless infringement on an offender's right to freely associate.

Here, the trial court's order prohibiting Garcia from associating with any probationer or parolee bears no reasonable relation to the goal of promoting safety and public order. There is, moreover, no indication that it was sensitively imposed. There is no discussion in the record of the

condition or its possible connection with the crimes. The condition is, therefore, unconstitutional, and it must be stricken for this reason as well. Bahl, 164 Wn.2d at 757-58.

2. THE CONDITION REQUIRING GARCIA TO OBTAIN A CHEMICAL DEPENDENCY ASSESSMENT WAS NOT AUTHORIZED BY STATUTE.

The community condition requiring that Garcia obtain a chemical dependency assessment was not authorized by statute. As a result, it too must be stricken.

A trial court lacks authority to impose a community custody condition unless authorized by the legislature. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008).

RCW 9.94A.505(9) provides, “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” Under the Sentencing Reform Act (SRA), as a condition of community custody, the court is authorized to require an offender to “[p]articipate in crime-related treatment or counseling services,” RCW 9.94A.703(3)(c), and in “rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

The SRA specifically authorizes the trial court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense:

Where the court finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1) (emphasis added).

If the court fails to make the required finding, however, it lacks statutory authority to impose this condition. State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, the trial court did not make the required finding. CP 25; RP 17-18 (pronouncement of sentence). This Court should, therefore, strike the condition.

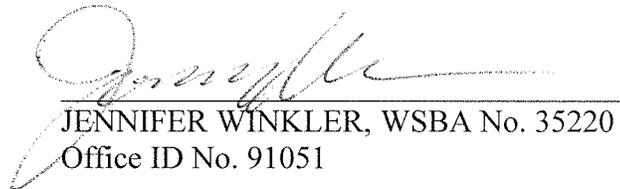
D. CONCLUSION

This Court should remand for removal of the invalid community custody conditions.

DATED this 22nd day of January, 2018.

Respectfully submitted,

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