

35613-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

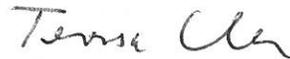
JULIAN GARCIA,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentencing of the Appellant.

III. ISSUES

1. Did the court abuse its discretion in imposing, as a condition of community custody, a prohibition against associating with parolees and probationers?
2. Did the court abuse its discretion in ordering, as a condition of community custody, that the defendant to obtain a chemical dependency assessment and comply with treatment recommendations?

IV. STATEMENT OF THE CASE

The Defendant Julian Garcia was charged with two counts of assault in the second degree (domestic violence) and interfering with the reporting of domestic violence. CP 4-6. The charges were

reduced for plea, and the Defendant invited the court to review the police reports at his change of plea. RP 11.

The police report describes that the Defendant had been harming puppies – holding them by their necks and causing them to yelp. CP 1. When his mother took the dogs away from him and put them in a room, the Defendant punched the door and had to be restrained so he did not damage the door. CP 1. When his mother was unable to restrain him, she went to call his father. CP 2. The Defendant struggled with his mother over the phone and pushed her to the floor. CP 2. When his brother came to her rescue, the Defendant fought with both his mother and brother. CP 2. He struck his brother in the face with his fist three times. CP 2. He attacked both family members, first with broken glass and then a large kitchen knife. CP 2. While armed with the knife, the Defendant said he was going to kill them. CP 2. Both victims told police they believed the Defendant would carry out his threats to kill them. CP 3.

On September 13, 2017, the 22-year-old Defendant pled guilty to reduced domestic violence charges of assault in the third degree and assault in the fourth degree. CP 9-20. The

prosecutor's plea offer included an advisement that the prosecutor would be recommending drug treatment. CP 20. Pending sentencing, the Defendant was subject to random urinalyses, with a positive result having the possible consequence of his being returned to custody. RP 12.

On September 18, 2017, at the sentencing hearing, when the prosecutor recommended drug treatment, the Defendant¹ did not deny that he had an issue with substance abuse, but only that he had been using drugs at the time of the assault. RP 15-16 ("And I'm still sober."). The prosecutor represented to the court that the Defendant had a recent methamphetamine case, that this is "a really difficult drug to beat," that "this offense likely would not have occurred but for [his] substance abuse," and that treatment during supervision would help prevent recurrence of "offenses like this." RP 15-16.

The court imposed sentence, requiring the Defendant to "obtain a chemical dependency assessment and comply with all recommendations" and to "not associate with any individuals who

¹ The Brief of Appellant (BOA) misattributes this statement to the defense attorney. BOA at 3. In fact, no officer of the court made this unlikely representation. Counsel stepped aside to allow his young client to make this account entirely on his own. RP 15.

are on probation or parole.” CP 29. The Defendant challenges these community custody conditions on appeal.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A CONDITION PROHIBITING CONTACT WITH PROBATIONERS AND PAROLEES.

The Defendant challenges the standard² prohibition against associating with person on probation or parole both under the statute and under the constitution.

A trial court has discretion to order an offender to refrain from contact with a specified class of individuals during community custody. RCW 9.94A.703(3)(b). Such discretionary conditions will be reversed only if their imposition is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010). The imposition of an unconstitutional condition is manifestly unreasonable. *Valencia*, 169 Wn.2d at 792.

1. The condition is authorized under RCW 9.94A.703(3)(b).

The condition is authorized by the statute, which gives the

² It is a standard condition recommended by the Sentencing Commission that an offender may not associate with convicted felons. *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010) (citing U.S. Sentencing Guidelines Manual § 5D1.3(c)(9) (2008)). The prohibition is not impermissibly vague. *United States v. King*, 608 F.3d 1122, 1128-29 (9th Cir. 2010).

superior court discretion to order an offender to refrain from direct or indirect contact with [...] a specified class of individuals. RCW 9.94A.703(3)(b). In particular, a prohibition against association with parolees and probationers is authorized by the statute. *State v. Acevedo*, 159 Wn. App. 221, 233, 248 P.3d 526, 531 (2010).

The Defendant argues that the condition additionally must be “crime-related.” BOA at 4, 7. The argument conflicts with the plain language of the statute and with case law. RCW 9.94A.703(3)(b); *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); *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239, 243 (1992) (a condition imposed under this section need not be crime-related).

In support of his claim, the Defendant relies on *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998) (consolidating claims by petitioners Riles and Gholston). BOA at 8-9. This reliance misstates both the issue in *Riles* and the holding.

The petitioners in *Riles* challenged a prohibition against contact with minors (not probationers) as being unconstitutionally overbroad (not unrelated to the crime of conviction). *State v. Riles*, 135 Wn.2d at 336, 338. The *Riles* opinion consolidated the

petitions of two sex offenders. Riles had been convicted of raping a six year old boy; Gholston had been convicted of raping a nineteen year old woman. *State v. Riles*, 135 Wn.2d at 332, 336. The court found the prohibition overbroad as applied to Gholston only.

We cannot extrapolate from this case that the Washington Supreme Court has invalidated the plain language of RCW 9.94A.703(3)(b). Nor can we say that *Riles* addressed, much less overruled, the holdings in *State v. Llamas-Villa*, *State v. Bobenhouse*, and *State v. Acevedo*.

This challenge is more appropriately formulated as a constitutional overbreadth argument. BOA at 10-11.

2. The condition is not constitutionally overbroad.

It is axiomatic that a sentencing court has broad discretion to prohibit association between and among convicted felons. Discouraging supervised offenders from associating with each other is a time-honored probationary practice designed to encourage compliance with the law by disrupting old associational patterns. *Cf. State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (prohibition against associating with other computer hackers is not an unconstitutional restriction but rather helps prevent Riley

from further criminal conduct for the duration of his supervision); *United States v. Gracia*, 755 F.2d 984 (2d. Cir. 1985) (prohibition against association with known criminals advanced legitimate probation objectives of protecting the public and rehabilitating the defendant and was not an unduly harsh condition).

[I]t is beyond question that preventing a probationer from associating with those apparently involved in criminal activities is “reasonably related” to the probationer’s rehabilitation and the protection of the public. See *United States v. Consuelo-Gonzales*, 521 F.2d 259, 264 (9th Cir. 1975) (en banc).

United States v. Furukawa, 596 F.2d 921, 923 (9th Cir. 1979). Preventing reoffense by limiting contact with other offenders is a compelling state interest. And the court acts within its discretion when it imposes a condition prohibiting association with felons in order to better protect the public and better assist the defendant achieve rehabilitation. *Id.* Such restrictions are reasonably necessary and narrowly drawn to accomplish the essential needs of the state and public order. *State v. Warren*, 134 Wn. App. 44, 70-71, 138 P.3d 1081 (2006).

In a recent, unpublished opinion, this court scrutinized whether a challenge to a community custody condition fell under the First Amendment freedom of “expressive association” versus

the Fourteenth Amendment right to “intimate association.” *State v. Dickerson*, 194 Wn. App. 1014, 2016 WL 3126480 (2016) (unpublished, nonbinding, but citable under GR 14.1).

The source of the right is critical, because it affects the grounds on which the community custody condition may be challenged. [...] courts have “generally confined the overbreadth argument to statutes or ordinances impinging on First Amendment activities.” *City of Seattle v. Montana*, 129 Wn.2d 583, 598 n.7, 919 P.2d 1218 (1996).

State v. Dickerson, 2016 WL 3126480 at *3 (denying the challenge where the right was determined to arise under the Fourteenth Amendment). The First Amendment guards speech, assembly, petition for the redress of grievances, and the exercise of religion. *Dickerson*, 2016 WL 3126480 at *2. The Fourteenth Amendment guards intimate human relationships that attend the creation and sustenance of a family, including marriage, childbirth, the raising and educating of one’s children, and cohabitation with one’s relatives, but not extending to the ability to choose one’s fellow employees. *Dickerson*, 2016 WL 3126480 at *3.

In the *Dickerson* case, the restriction was on romantic relations, such that the source of the right was clear. Here, the Defendant’s challenge is vague. The Defendant does not explain

what the purpose of his associating with parolees or probationers would be, whether he would seek to associate with this group for romantic/familial versus political/religious purposes. He does not ask for any exemption to associate with an intimate partner; and he does not allege that parolees are gathering with a political speech purpose. Because no explanation is provided, it is likely none of these purposes are present. The State's concern is that the Defendant's purpose in associating with parolees and probationers would be to engage in criminal behavior, e.g. assaultive or drug abusing behavior. Such is not a protected purpose.

An offender's usual freedom of association may be restricted if the restriction is reasonably necessary to accomplish the needs of the State and public order. *State v. Bobenhouse*, 143 Wn. App. at 332. Accordingly, a court may order a drug offender not to associate with people who use drugs. *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006) (upholding prohibition from associating with known drug offenders); *State v. Llamas-Villa*, 67 Wn. App. at 455-56 (upholding prohibition from associating with persons using, possessing, or dealing controlled substances). And a court may prohibit association with known felons and members of

a specified gang. *State v. Weatherwax*, 193 Wn. App. 667, 677–81, 376 P.3d 1150, 1155 (2016), *review granted on other grounds*, 186 Wn.2d 1009, 380 P.3d 490 (2016), *and rev'd*, 392 P.3d 1054 (Wash. 2017).

In this case, the facts of Mr. Garcia's offense include likely animal abuse, domestic abuse, and drug abuse. It is a broad range of offenses. The twelve month period of supervision should limit his association with a class of persons who are being supervised for commission of similar criminal acts. In any case, because the circumstances of Mr. Garcia's offense include a variety of criminal behavior, the prohibition against contact with criminal association is a reasonable crime-related sentencing condition.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING REHABILITATIVE PROGRAMS.

The Defendant claims the community custody condition regarding treatment is not authorized by statute, arguing the Defendant's substance abuse was unrelated to the offense. BOA at 12.

As part of any term of community custody, the court has the discretion to order an offender to:

- ...
- (c) Participate in crime-related treatment or counseling services;
 - (d) Participate 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). The record establishes that the condition is crime-related. At sentencing, the Defendant stated that he was “still” sober indicated that sobriety was an issue for him. RP 15-16. The prosecutor informed the court that the Defendant’s methamphetamine involvement was “recent.” RP 16. Random urinalyses were ordered pending sentencing. RP 12. And the criminal behavior was itself inexplicable absent either substance abuse, mental illness, or both, and there is no record of mental illness. The record is that “this offense likely would not have occurred but for [his] substance abuse.” RP 15.

The Defendant urges that a judicial finding is required on the record. BOA at 13. In support of this claim, the Defendant cites *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013). This is dicta. As the opinion notes, “Warnock does not claim the trial court made no finding at all or no evidence exists to support

evaluation and treatment.” *State v. Warnock*, 174 Wn. App. at 612.

An explicit finding is not required. A condition imposing a rehabilitative program “must be supported by evidence in the record or found by the trial court to be related to the underlying offense.” *State v. Munoz-Rivera*, 190 Wn. App. 870, 892, 361 P.3d 182, 192 (2015) (emphasis added); *State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258, 263 (2003) (upholding the condition requiring alcohol counseling because there was evidence which showed alcohol’s relation to the offense).

The court did not abuse its discretion where, prior to ordering the condition, it received statements from both the prosecutor and the Defendant on this topic, and that record supports the condition imposed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction and sentence.

DATED: March 21, 2018.

Respectfully submitted:

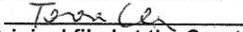


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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 21, 2018, Pasco, WA


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