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State of Washington  
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NO. 36381-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON

Respondent,

v.

ZACHARY BERGSTROM,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

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## A. INTRODUCTION

Zachary Bergstrom was a passenger in the wrong car at the wrong time. It was after midnight when officers approached Jada Thibodeau's parked vehicle. The car was messy, with blankets and purses strewn about; only by using their flashlights were officers able to observe what looked like a firearm in the backseat footwell, next to where Mr. Bergstrom was sitting. He appeared to be under the influence and unaware of it entirely, making no attempt to hide or explain its presence. His fingerprints were not on the alleged weapon and no bullets were located on his person or in his backpack. A subsequent search of the vehicle revealed controlled substances in both the front and backseats. Mr. Bergstrom was convicted of possession of a firearm, possession of methamphetamine with intent to distribute with a firearm enhancement, and possession of heroin. After defense counsel ignored the court's repeated requests to brief a possible exceptional downward sentence, the court reluctantly sentenced Mr. Bergstrom to 10 years in prison.

The State failed to present evidence beyond Mr. Bergstrom's proximity to the contraband, that the alleged firearm was a gun in fact, or that Mr. Bergstrom was "armed" for the purpose of the firearm enhancement, requiring reversal. Alternatively, Mr. Bergstrom received ineffective assistance of counsel at sentencing, requiring remand.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support Mr. Bergstrom's conviction for second degree unlawful possession of a firearm.
2. The evidence was insufficient to establish possession of a controlled substance with intent to deliver.
3. The evidence was insufficient to establish possession of a controlled substance.
4. The evidence was insufficient to support the finding that Mr. Bergstrom was "armed" for the purpose of the firearm enhancement.
5. Mr. Bergstrom was deprived of his Sixth Amendment right to effective assistance of counsel at resentencing where defense counsel failed to brief or present argument in favor of an exceptional downward sentence despite the trial court's repeated request that he do so.
6. The trial court abused its discretion in believing it did not have the authority to impose an exceptional downward sentence.
7. The trial court abused its discretion in ordering Mr. Bergstrom to register as a felony firearm offender.
8. The condition of community custody prohibiting Mr. Bergstrom from having contact with DOC-identified drug offenders is unconstitutionally vague and violates Mr. Bergstrom's fundamental right to freedom of association.

9. The condition of community custody granting Mr. Bergstrom's community corrections officer (CCO) the authority to order Mr. Bergstrom to either remain within or outside any geographical boundary is not crime related, is unconstitutionally vague, and violates Mr. Bergstrom's fundamental right to travel.

10. The condition of community custody requiring Mr. Bergstrom to "obey all conditions of community custody imposed by the Department of Corrections" is unconstitutionally vague.

11. The trial court abused its discretion in entering an off-limits order.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. To establish the offense of unlawful possession of a firearm, the State must prove beyond a reasonable doubt the possessed object is a firearm as defined in RCW 9.41.010. Even if currently inoperable, the object must be a gun in fact, and not just a gun-like object. In this case, while presenting evidence of a firearm tested by law enforcement, the prosecution failed to present evidence that the firearm tested was the alleged gun inside the vehicle. Where the State's only remaining evidence was a picture of a gun-like object in the car, was the evidence insufficient to establish Mr. Bergstrom possessed a gun in fact?

2. The definition of firearm under RCW 9.41.010 was incorporated into the jury instruction regarding the firearm enhancement. Where the State failed to establish that the alleged firearm in the car was a gun in fact, was the evidence insufficient to support the enhancement?

3. To establish constructive possession of a firearm, the State must prove beyond a reasonable doubt that a defendant had dominion and control over the weapon; mere proximity is insufficient. Courts are reluctant to find constructive possession where an individual is a passenger in a vehicle, even if the individual is immediately next to the contraband. Where Mr. Bergstrom was a passenger in the car and the State failed to present any evidence connecting him with the alleged firearm beyond mere proximity, was the evidence insufficient to establish constructive possession?

4. To establish possession of a controlled substance with intent to deliver, the State must prove beyond a reasonable doubt that a defendant had dominion and control over the controlled substance; mere proximity is insufficient. Although the methamphetamine was in a zippered pouch near Mr. Bergstrom's feet, he was a passenger in the car, no forensic evidence or statements connected Mr. Bergstrom with the pouch, and his behavior suggested he was unaware of the pouch. Where the evidence was limited

to Mr. Bergstrom's mere proximity, was it insufficient to establish constructive possession of methamphetamine?

5. For the above reasons, was the evidence insufficient to establish constructive possession of heroin?

6. To establish an individual was "armed" for the purpose of a firearm sentencing enhancement, the State must prove a nexus between the weapon and the offense. For the offense of possession with intent to deliver, a nexus exists only where the State can show that the weapon was actually "there to be used" in the commission of the crime. Where the State failed to present evidence suggesting Mr. Bergstrom was in the car for the purpose of delivering methamphetamine, that he possessed the alleged firearm before entering the car, or circumstantial evidence connecting him with the alleged firearm, was the evidence insufficient to establish he was armed while in the commission of a crime?

7. Mr. Bergstrom has a Sixth Amendment right to effective assistance of counsel at sentencing, including representation by counsel who is apprised of the relevant law. Is reversal required where counsel failed to respond to the trial court's repeated requests to brief the issue of whether Mr. Bergstrom was entitled to an exceptional mitigated sentence and instead informed the court there was no basis to impose an exceptional sentence despite caselaw to the contrary?

8. A sentencing court errs when it operates under a mistaken belief that it does not have the discretion to impose an exceptional mitigating sentence for which a defendant may be eligible. Is reversal required where the trial court apparently believed that it could not consider Mr. Bergstrom's individual culpability to impose an exceptional sentence despite caselaw to the contrary?

9. Prior to ordering an individual to register as a felony firearm offender, the court must consider three statutory factors under RCW 9A.41.330, including an individual's (1) criminal history; (2) prior findings of not guilty by reason of insanity; and (3) "[e]vidence of . . . propensity for violence that would likely endanger persons." Is remand required where the court ordered Mr. Bergstrom to register as a felony firearm offender without considering any factor beyond his criminal history?

10. A sentencing court errs when it imposes community custody conditions that are unrelated to the underlying offense or unduly infringe upon constitutional rights. Did the court err in entering a condition of community custody prohibiting Mr. Bergstrom from having contact with DOC-identified drug offenders where the condition is unconstitutionally vague and violates Mr. Bergstrom's right to freedom of association?

11. Did the court err in entering a condition of community custody requiring Mr. Bergstrom to remain inside and/or outside any geographical

boundary set by his Community Corrections Officer (CCO) where the condition is unrelated to the underlying offense, is unconstitutionally vague, and infringes on Mr. Bergstrom's right to travel?

12. Did the court err in entering a community custody condition requiring Mr. Bergstrom to "obey all conditions of community custody imposed by the Department of Corrections" where the condition is unconstitutionally vague and allows DOC to require or prohibit behavior that is not related to the underlying offense?

13. Prior to entering an off-limits order prohibiting drug offenders from entering a "protected against drug trafficking" (PADT) area pursuant to RCW 10.66.020, the court must find that the offense occurred within a PADT area and the order must identify the specific off-limits area. Is remand required where the trial court entered an off-limits order without designating the location of the offense and specifying the off-limits area as "TBD – if necessary per community corrections officer"?

#### D. STATEMENT OF THE CASE

##### **1. Mr. Bergstrom was a passenger in Ms. Thibodeau's car.**

At approximately 12:30 a.m., Deputy Tyler observed a car sitting in a parking lot near Minnehaha Park.<sup>1</sup> RP 177-78. The parking lot was

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<sup>1</sup> The testimony on the exact location of the car was contradictory, with Deputy Tyler testifying the stop occurred on Euclid Avenue and Deputy Pfeifer stating the stop occurred on Havana Street. RP 129, 177.

closed due to park hours, and Deputy Tyler decided to initiate a stop. RP 179. Approaching the vehicle from the passenger's side, she observed Jada Thibodeau in the driver's seat,<sup>2</sup> a front-seat passenger, and Zachary Bergstrom sitting in the back, driver's-side passenger seat. RP 179, 205. The front-seat passenger appeared to reach forward as the Deputy approached. RP 204. Ms. Thibodeau was initially uncooperative, refusing to roll down the passenger's side window and pretending to call 9-1-1 before ultimately providing Deputy Tyler with identification. RP 204. The front seat passenger verbally identified herself, while Mr. Bergstrom appeared lethargic and under the influence, but passed forward his identification. RP 181-82, 205-06.

Deputy Philip Pfeifer arrived shortly thereafter, approaching the vehicle from the driver's side. RP 127, 129. The vehicle was messy, with purses, containers, and blankets throughout. RP 145-46. Using his flashlight, Deputy Pfeifer observed what appeared to be a handgun sitting near Mr. Bergstrom's feet. RP 131. All three occupants were immediately removed from the car and placed in handcuffs. RP 133-35.

During a subsequent search of the vehicle, officers discovered a container in the front driver's side of the vehicle, which held several

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<sup>2</sup> The vehicle was registered to Ms. Thibodeau's husband. RP 205.

smaller containers of heroin, and a black zippered pouch wedged between the door and the floorboard near where Mr. Bergstrom was sitting. RP 207. The pouch contained approximately 48 grams of methamphetamine, .3 grams of heroin, as well as a scale, baggies, and small tube. RP 195, 225. A second scale was located in the back seat, and a holster was found underneath one of the blankets. RP 189, 196. A backpack containing a green notebook and a Goodwill voucher for Mr. Bergstrom was also found in the back seat. RP 188-190. Mr. Bergstrom's wallet contained approximately \$476. RP 189-90, 200.

Mr. Bergstrom did not make any statements to law enforcement and no drugs or guns were found on his person. RP 134, 209. Mr. Bergstrom's prints were not on the alleged firearm. RP 166. The deputies decided not to submit the zippered pouch, scales, or other items for fingerprint or forensic testing. *See* RP 168.

The State nevertheless charged Mr. Bergstrom with second-degree unlawful possession of a firearm, possession of a stolen firearm, and possession of methamphetamine with intent to deliver. CP 1-2. After Mr. Bergstrom refused to accept the State's offer of a prison-based Drug Offender Sentencing Alternative (DOSA), the State amended the charges to include a firearm enhancement for count three and the additional count of possession of heroin. CP 8-9; RP 13.

**2. Mr. Bergstrom was brought to trial for drugs and a gun found in the car in which he was a passenger.**

Neither Ms. Thibodeau nor the front seat passenger testified at trial. *See* RP 115-228. Thus, the State's case rested primarily on observations made by Deputies Pfeifer and Tyler during the stop and subsequent search of the vehicle. In her testimony, Deputy Tyler acknowledged she was unaware of how long Mr. Bergstrom had been in the car. RP 203. She opined that the contents of the zippered pouch itself suggested the intent to deliver given the quantity of the methamphetamine and other paraphernalia. RP 201-02. Although there was no evidence Mr. Bergstrom handled the pouch, Deputy Tyler believed written notes in the green notebook found in the backpack referred to quantities of controlled substances, specifically heroin. RP 190-91.

The connection between Mr. Bergstrom and the alleged firearm was even more tenuous. Deputy Tyler never observed Mr. Bergstrom touch the firearm and confirmed his fingerprints were not on the weapon. RP 207-09. Mr. Bergstrom did not attempt to hide the alleged weapon, did not claim ownership, and no evidence was presented that the other occupants denied ownership or stated the alleged firearm belonged to Mr. Bergstrom. *See* RP 131-32, 134.

The State presented testimony by Detective Roger Knight in an attempt to establish the alleged firearm was, in fact, an operable gun. RP 116. Specifically, the prosecution presented Detective Knight with a “cardboard box full of items,” from which he identified proposed Exhibit No. 29 as a pistol. RP 117, 121. Although he was not involved in the stop or search of the vehicle, Detective Knight transported the pistol to the State Patrol Crime Lab for testing and found the firearm to be operational. RP 121-22, 124. At no point did Detective Knight identify the firearm as the one taken from the car in which Mr. Bergstrom was a passenger or otherwise connect the firearm with Mr. Bergstrom’s case. *See* RP 116-24. Similarly, Samantha Micke, a forensic technician for the Spokane County Sheriff’s Office, testified that she tested proposed Exhibit No. 29 for fingerprints, but failed to identify the firearm as the one removed from the car in which Mr. Bergstrom was seated. *See* RP 159-67.

Neither Deputy Tyler nor Deputy Pfeifer identified proposed Exhibit No. 29 as the alleged firearm they removed from the vehicle. *See* RP 125-46, 174-210. The exhibit was never admitted into evidence and the jury was instructed that the exhibit was illustrative and should not be considered evidence. CP 60.

The only remaining evidence relating to the tested firearm was testimony by Daniel Hepting, who identified the exhibit as a firearm he

previously owned and reported stolen. RP 155-57. According to Mr. Hepting, the pistol had been modified inasmuch as the rubber grip was removed. RP 157. As with the previous witnesses, Mr. Hepting did not link the firearm to the one found in Ms. Thibodeau's vehicle.

At the end of the State's case, Mr. Bergstrom moved to dismiss the possession of a stolen firearm count as there was no evidence Mr. Bergstrom knew the firearm was stolen: no testimony connected Mr. Bergstrom with the underlying theft, and the State failed to present evidence of how the gun came to be in the vehicle. RP 229-30. Moreover, the fact that the grip was removed was not an extrinsic characteristic that would have suggested to Mr. Bergstrom that the gun was stolen. *See* RP 232. The court granted the motion, finding there was no evidence presented "that suggest[ed] even circumstantially that Mr. Bergstrom had knowledge that the weapon was stolen." RP 234-35. The court therefore instructed the jury to disregard Mr. Hepting's testimony as it was not relevant to the remaining counts. RP 261, 269.

The jury found Mr. Bergstrom guilty on all counts. CP 174-75, 177. The jury additionally answered "yes" to the special verdict of whether Mr. Bergstrom was armed with a firearm during the commission of count three. CP 176.

**3. The trial court corrects the erroneous sentence it imposed.**

After Mr. Bergstrom filed his Notice of Appeal, it was determined his sentence for possession with intent to deliver exceeded the statutory maximum of 120 months, requiring resentencing.<sup>3</sup> The trial court repeatedly asked for briefing on whether it was able to impose an exceptional downward sentence, even continuing the sentencing hearing so counsel could submit a brief. 7/18/19 RP 17-20. Despite the courts requests, counsel did not submit a brief and, in fact, erroneously informed the court that it lacked the authority to impose an exceptional sentence because of the firearm enhancement and a prohibition on imposing an exceptional sentence to allow for community custody. 7/25/19 RP 3-5, 17-18. The court reluctantly sentenced Mr. Bergstrom to the statutory maximum of 10 years in prison. 7/25/19 RP 15-17.

E. ARGUMENT

**1. The evidence was insufficient to establish both unlawful possession of a firearm and the firearm enhancement as the State failed to show the alleged firearm was a gun in fact.**

The State failed to establish Mr. Bergstrom possessed an actual gun and not simply a gun-like object. Due process demands the State

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<sup>3</sup> The court initially sentenced Mr. Bergstrom to 126 months on count 3 based upon a standard range sentence for the underlying offense of 90 months and the mandatory, 36-month consecutive firearm enhancement. CP 109-10. It was later determined that Mr. Bergstrom's standard range was 100-120 months. CP 138.

prove all elements of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Although the evidence is viewed in the light most favorable to the prosecution on review, “[i]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). “A ‘modicum’ of evidence does not meet this standard. *Rich*, 194 Wn.2d at 903 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

*a. The element of “firearm” requires proof beyond a reasonable doubt that the weapon or device is capable of being fired.*

The existence of a “firearm” is an essential element of unlawful possession of a firearm. RCW 9.41.040(1)(a). RCW 9.41.010(11) defines “firearm” as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” Although courts do not require proof of contemporaneous operability, “[i]n order to be a ‘firearm’ within the meaning of RCW 9.41.010, a device must be capable of being fired, either instantly or with reasonable effort and within a reasonable time.” *State v. Tasker*, 193 Wn. App. 575, 595, 373 P.3d 310 (2016); *see also State v. Padilla*, 95 Wn. App. 531, 535, 978 P.2d 1113

(1999). At a minimum, the State must establish the object is an actual firearm, *i.e.* a “gun in fact.” *See Tasker*, 193 Wn. App. at 595. A gun-like object that is incapable of being fired is not a “firearm.” *State v. Jussila*, 197 Wn. App. 908, 933, 392 P.3d 1108 (2017).

*b. The State failed to present evidence beyond a photo of a gun-like object.*

While presenting evidence of *an* operable firearm, the State did not present any testimony that it was *the* firearm at issue. Namely, the prosecutor offered only the testimony of Detective Knight – who was not involved in the incident or evidence collection – that proposed Exhibit No. 29 was an operational .45-caliber pistol. RP 177, 121-22, 124. However, neither Detective Knight nor any other witness testified the firearm was the same one collected in Mr. Bergstrom’s case or provided other identifiers that suggested it was connected with the incident. RP 165-66.<sup>4</sup> The proposed exhibit was not entered into evidence and the jury was instructed that it was not evidence and was offered solely for the purpose of helping the jury understand the evidence admitted. CP 60; RP 268.

The only remaining evidence relating to the alleged firearm found in Ms. Thibodeau’s vehicle were photos of the object lying on the floor of

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<sup>4</sup> By comparison, the State elicited testimony from Deputy Tyler the exhibits including the zippered pouch, notebook, and money were, in fact, the items that were taken from the car on the night of the incident. RP 193-97.

the car and Deputy Pfeifer's testimony that he saw the handle of a handgun near Mr. Bergstrom's feet. RP 131; Exs. 1-4. Absent some connection to the proposed exhibit, however, pictures of what appears to be a gun are insufficient to show an object is actually a device that "may be fired" absent additional, corroborating evidence. RCW 9.41.010(11).

This limited evidence differs significantly from cases in which courts have found the evidence sufficient to establish the defendant was in possession of an actual firearm, operable or otherwise. First, the State failed to establish the object in the car was a particular firearm, *i.e.* Mr. Hepting's pistol. *See Jussila*, 197 Wn. App. at 933-34 (witness testified he recognized the guns as those previously inside his home).

Second, the State failed to present any testimony about the alleged gun's physical attributes. While Deputy Pfeifer's testimony took for granted that the object was a gun in fact, the State presented no testimony that the gun appeared real to the officers, that it had any of the physical characteristics of an actual firearm, or that it held a magazine or bullets. *See State v. Anderson*, 94 Wn. App. 151, 162-63, 971 P.2d 585 (1999), *rev'd on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (firearm was admitted as an exhibit at trial, law enforcement testified gun appeared to be a real gun, and witnesses testified they felt a gun with a trigger); *State v. Raleigh*, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010) (law

enforcement identified gun as a Brigadier 9mm pistol, and the State presented evidence that the object held a magazine loaded with a round of ammunition and had a working safety and slide); *State v. McKee*, 141 Wn. App. 22, 31, 167 P.3d 575 (2007) (witness described weight and feel of gun); *Tasker*, 141 Wn. App. at 31 (gun made clicking noise consistent with that made by a real firearm).

Finally, the State presented no evidence that Mr. Bergstrom acted in a manner suggesting the gun was an actual firearm. *See McKee*, 141 Wn. App. at 31 (the defendant wielded object as if it was a real gun); *Tasker*, 193 Wn. App. at 59 (the defendant pointed the gun at the victim while demanding her purse); *State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984) (the defendant threatened to use gun). Mr. Bergstrom did not threaten anyone with the alleged firearm, did not wield it, and, assuming for the moment the State's position that he was even aware of its presence, made no attempt to hide it from law enforcement.

The unfortunate reality is that many toy guns are indistinguishable from their real counterparts, with some police departments conceding that it is "nearly impossible – even for a trained police officer – to tell the difference simply by observing them." Leila Atassi, *Can you tell a real gun for a toy? It's tougher than you think. Take our Quiz*, cleveland.com, [https://www.cleveland.com/cityhall/2015/03/can\\_you\\_tell](https://www.cleveland.com/cityhall/2015/03/can_you_tell)

\_a\_real\_gun\_from\_a.html (last visited Sept. 26, 2019). Since 2014, police officers have killed approximately 153 people holding toy guns. *How Realistic-Looking Toy Guns Confuse Police And Get People Killed*, Texas Standard, <https://www.texasstandard.org/stories/how-realistic-looking-toy-guns-confuse-police-and-get-people-killed/> (last visited Sept. 26, 2019). Indeed, gun manufacturers sell branding and schematics to toy manufacturers to allow them to create real-life replicas. *Id.* Some police departments are even initiating programs to buy back real-looking toy guns in an effort to stem this confusion. “*Which is the BB gun?*” *Cambridge police looking to buy back realistic toy guns, unwanted firearms*, Channel 7 News, Boston (June 5, 2019), <https://whdh.com/news/which-is-the-bb-gun-cambridge-police-looking-to-buy-back-realistic-toy-guns-unwanted-firearms/>.

These circumstances illustrate why the State must present evidence beyond photos of an object appearing to be a realistic firearm to establish that the object was **actually** a firearm under RCW 9.41.010(11). It cannot be excused for its failure to do so in Mr. Bergstrom’s case.

- c. *The State’s failure to establish the object was a gun in fact requires reversal of both the underlying conviction and the firearm enhancement.*

Reversal is required where the State fails to prove an element of an offense or evidence sufficient to support a special verdict finding. *State v.*

*Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Here, the jury instructed on the statutory definition of “firearm” in both the general instructions and the special instruction regarding the firearm enhancement. The State’s failure to prove the existence of a firearm is thus fatal to the conviction for unlawful possession and the enhancement. CP 69-70, 73. This Court should reverse and dismiss with prejudice. *Id.*

**2. The State failed to prove beyond a reasonable doubt that Mr. Bergstrom possessed the alleged firearm as the evidence established only mere proximity.**

The evidence was insufficient to establish unlawful possession of a firearm as it showed only Mr. Bergstrom’s proximity to the object. Possession may be actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). To establish constructive possession, the State must prove the defendant had dominion and control over either the premises where the firearm was found or the firearm itself. *Id.* at 521. Where an individual does not have dominion and control of the premises, close proximity to the firearm, and even momentarily handling, is insufficient to establish constructive possession. *See State v. George* 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Constructive possession “entails actual control.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Courts do not hesitate to reverse convictions for unlawful possession where the State fails to present evidence beyond mere

proximity to the contraband. For example, in *State v. Spruell*, this Court reversed a conviction for constructive possession where the State's evidence as to one of the defendants was limited to his presence in the room when officers discovered cocaine and paraphernalia consistent with sale. 57 Wn. App. 383, 386, 788 P.2d 21 (1990). The defendant did not own or reside in the house, and the State presented no evidence as to why the defendant was in the house or how long he had been there. *Id.* at 388. The only connection with the cocaine was his close physical proximity when officers arrived on the scene, which was insufficient to establish dominion and control over the drugs. *Id.* at 388-89. At best, the defendant had only passing control over the drugs. *Id.* at 386.

Where contraband is found in close proximity to a defendant in a vehicle, whether the defendant also owned or drove the vehicle is a "key factor" in demonstrating dominion and control. *State v. Chouinard*, 169 Wn. App. 895, 900, 282 P.3d 117 (2012). "[C]ourts hesitate to find sufficient evidence of dominion and control where the State charges passengers with constructive possession." *Id.* at 895; compare *George* 146 Wn. App. at 923 (backseat passenger did not have dominion and control over pipe near his feet), and *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004) (evidence insufficient to establish constructive possession where defendant was passenger in truck and fingerprint found on

contraband's container in bed of truck), *with State v. Echeverria*, 85 Wn. App. 777, 780, 934 P.2d 1214 (1997) (evidence sufficient to establish dominion and control where defendant driving and gun in plain sight at defendant's feet).

The evidence in Mr. Bergstrom's case is indistinguishable from that in *State v. George*. In *George*, the defendant was a passenger in the back seat; when ordered to exit the car, police discovered a pipe on the floorboard where the defendant was sitting, resulting in charges for possession of marijuana and drug paraphernalia. 146 Wn. App. at 912-13. Because the defendant was neither the owner nor the driver of the car, the court was presented only with the question of whether the State established dominion and control over the contraband itself. *Id.* at 920. The answer was a resounding "no," even when viewed in the light most favorable to the State. *Id.* at 923.

Importantly, the court explicitly rejected the premise that the defendant's ability to immediately reduce the pipe to his actual possession established constructive possession, noting that the defendant in *Spruell* could easily have done the same. *Id.* at 923; *see also Callahan*, 77 Wn.2d at 31 (evidence insufficient to establish constructive possession where defendant was sitting at desk where drugs located).

The court also explicitly rejected the argument that the defendant's knowledge that the pipe was at his feet was sufficient to prove dominion and control ("The State cites no cases holding that proximity plus knowledge of a drug's presence establishes dominion and control over the drug.")<sup>5</sup> *George*, 146 Wn. App. at 923. Ultimately, the State failed to present fingerprint or other evidence linking George to the pipe or suggesting he used the pipe; he made no admissions of guilt; there was no testimony ruling out other occupants of the vehicle as owners of the pipe; and there was no evidence establishing when George got into the vehicle or how long he had been riding in it. *Id.* at 922. As such, the "State's evidence boil[ed] down to mere proximity." *Id.*

*State v. Chouinard* is even more compelling. As in *George*, the defendant was a passenger in the back seat. 169 Wn. App. at 897. When officers stopped the car, they noticed that the backrest on the backseat was detached, with a rifle protruding through the gap. *Id.* Upon questioning, Chouinard admitted knowing about the rifle and was thereafter convicted for unlawful possession of a firearm. *Id.* This Court reversed, finding insufficient evidence of dominion and control. Again, most significant was the defendant's status as a backseat passenger rather than the owner or

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<sup>5</sup> This principle is even more critical in cases involving unlawful possession of a firearm as the State must prove the defendant had actual knowledge of the firearm. *State v. Anderson*, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

driver of the vehicle. *Id.* at 899-901. However, the court also emphasized that, despite evidence of close proximity, there was no evidence that he ever handled the weapon or transported it to the vehicle. *Id.* at 901. Like the defendant in *George*, Chouinard was proximate to – and aware of – the firearm, but these facts, alone, did not amount to constructive possession. *Id.* at 903.

Here, it was uncontroverted that Mr. Bergstrom neither owned nor drove the vehicle, but was merely a passenger in the backseat. There was no evidence that he was actually aware of the gun, and the State presented no evidence ruling out other individuals as the gun's owner.<sup>6</sup> Indeed, the evidence suggested that he did not know of its presence inasmuch as the car was filled with various items, it was dark, and he appeared to be under the influence. He made no attempt to hide the weapon, yet the holster was discovered under a blanket in the backseat. No evidence was presented suggesting he touched or transported the weapon, even momentarily. No bullets or other items related to the gun were discovered on his person or in his possessions. Finally, the State presented no evidence as to how long Mr. Bergstrom had been in the vehicle.

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<sup>6</sup> Ms. Thibodeau status as the driver creates a rebuttable presumption that she of possessed the items found in her vehicle. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

As in *George*, the crux of the State's case was that the firearm was at Mr. Bergstrom's feet and he was the only passenger in the backseat, allowing him to easily reduce it to his actual possession. The prosecution emphasized in closing argument that Mr. Bergstrom would be able to reach down and grab the alleged firearm quickly. RP 293, 295. Although the ability to reduce an object to actual possession is an aspect of dominion and control, both precedent and logic preclude a conviction based upon this argument alone: if the ability to easily access a weapon were sufficient, virtually every case involving near proximity would require a conviction. Like the evidence presented in *Spruell*, *George*, and *Chouinard*, the State's case here "boiled down" to mere proximity. This Court should reverse and dismiss Mr. Bergstrom's conviction.

**3. The State failed to prove beyond a reasonable doubt that Mr. Bergstrom possessed the black zippered pouch, requiring reversal of his convictions for both possession with intent to distribute methamphetamine and possession of heroin.**

For the same reasons, the State failed to establish anything beyond mere proximity between Mr. Bergstrom and the controlled substances in the black zippered pouch. Again central to the analysis is Mr. Bergstrom's status as a passenger without dominion and control over the vehicle in which the pouch was located. Under these circumstances, there must be circumstantial evidence strongly connecting Mr. Bergstrom with the

pouch beyond his mere proximity. *See State v. Nyegaard*, 154 Wn. App. 641, 648, 226 P.3d 783 (2010), *modified on remand*, 164 Wn. App. 625, 267 P.3d 382 (2011) (evidence sufficient to establish possession where defendant was in reach of contraband, dropped paraphernalia into area where the contraband was located, and moved towards the contraband).

As with the alleged firearm, there was no direct evidence linking Mr. Bergstrom to the pouch. The green notebook in Mr. Bergstrom's backpack, while arguably linking him to drug sales, did not link him to the drugs at issue. *State v. Gutierrez*, 50 Wn. App. 583, 749 P.2d 213 (1988), is persuasive. There, police set up a series of controlled buys using marked bills, leading to surveillance of a storage unit belonging to one of the defendants. *Id.* at 584-85. Mr. Gutierrez was observed entering the storage unit and leaving approximately 40 minutes later. *Id.* at 585. A subsequent search of the unit revealed a trailer with a large amount of drugs and paraphernalia consistent with sale; Mr. Gutierrez was arrested at a separate location with marked bills from the controlled buys. *Id.* at 585-86. The court found the evidence insufficient to support possession of the drugs in the storage unit as Mr. Gutierrez's connection with the unit was a 40-minute visit and there was no direct evidence that he entered the trailer inside the unit. *Id.* at 593. While agreeing that the marked bills linked Mr. Gutierrez to the controlled buys, the court emphasized that circumstantial

evidence of involvement in drug sales did not sufficiently link him to the drugs found in the trailer. *Id.*

The same is true here. Circumstantial evidence linking Mr. Bergstrom to drug sales is insufficient to establish dominion and control over the zippered pouch where he did not own or drive the vehicle, the State presented no evidence as to how long he was in the vehicle, his fingerprints were not on the pouch, the evidence did not rule out the other occupants as owners, and Mr. Bergstrom did not act in a way suggesting ownership or even awareness of the drugs. Because the evidence was insufficient to establish constructive possession of the pouch, the State failed to meet its burden to prove both possession of methamphetamine with intent to distribute and possession of heroin, warranting reversal by this Court.

**4. The State failed to prove beyond a reasonable doubt that Mr. Bergstrom was “armed” with firearm as there was no nexus between Mr. Bergstrom, the gun, and the underlying offense of possession with intent to deliver.**

The evidence was insufficient to support the firearm enhancement as the State failed to establish a nexus between Mr. Bergstrom, the weapon, and the offense. In order to establish a defendant is “armed” for the purpose of a firearm enhancement, the State must prove both that (1) the weapon is easily accessible and readily available to use for offensive

or defensive purposes and (2) a nexus exists between the defendant, the weapon, and the underlying offense. *State v. O'Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007). “Requiring both that the weapon be readily available and accessible, as well as a nexus based on the facts of the case, limits the definition of being armed to those situations the statutes are aimed at controlling.” *Id.* at 435. Whether the evidence is sufficient to establish a defendant is armed is a question of law reviewed de novo. *State v. Schelin*, 147 Wn.2d 562, 566, 55 P.3d 632 (2002).

The presence of a deadly weapon at the scene of the crime, close proximity to the defendant, or constructive possession alone are insufficient to show that the defendant is armed with a firearm. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). Indeed, even actual possession of a deadly weapon during commission of the crime, without more, is insufficient to establish a nexus between the weapon and the crime. *See id.* at 432. Rather, in determining whether a nexus between the weapon and the crime exists, a court must analyze “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *Id.* at 431.

Establishing a nexus is particularly important where the underlying offense is a continuing crime. Just last year, in *State v. Sassen Van Elsloo*, our Supreme Court reiterated that the nexus “serves to place parameters ...

on the determination of when a defendant is armed, especially in the instance of a *continuing crime such as constructive possession of drugs.*” 191 Wn.2d 798, 827, 425 P.3d 807 (2018) (quoting *State v. Gurske*, 155 Wn.2d 134, 140, 118 P.3d 333 (2005)) (emphasis added). In the absence of a clear nexus, such cases create a real risk that a defendant will be punished under the firearm enhancement for having a gun that is unrelated to the crime. *Id.* at 827. Thus, in any type of continuing crime, including possession with intent to deliver, the State must establish not only that the weapon was accessible at some point during the offense, but that it was actually “there to be used” in the commission of the crime. *Id.* at 828.

In *Sassen Van Elsloo*, police officers observed the handle of a shotgun in the cargo hold of a car driven by the defendant, and a subsequent search revealed a litany of drugs and items associated with sale, as well as guns and ammunition. *Id.* 802-03. In upholding the firearm enhancement, the court emphasized that the evidence showed the defendant sold drugs from the car as part of an ongoing criminal enterprise. *Id.* at 829-30. Specifically, the passenger testified they were selling drugs, and the car where the gun was discovered contained a locked bank bag holding controlled substances, paraphernalia consistent with sale, and a locked safe containing money and additional guns. *Id.* at 830. The defendant’s DNA was discovered on the shotgun, which had a

shell in the magazine that could easily have been chambered and fired at another person, and the State established the safe and paraphernalia belonged to the defendant. *Id.* Under these circumstances, the evidence was sufficient to show that the gun was “there to be used” in the commission of the drug crimes. *Id.*

By comparison, in *Gurske*, the court reversed the sentencing enhancement for insufficient evidence where police discovered methamphetamine and a firearm in a backpack behind the driver’s seat. 155 Wn.2d at 143-44. Although the court ultimately concluded the State failed to meet the first prong as the weapon was not easily and readily available for use given the backpack’s position in the car, the court emphasized the need for both a physical nexus between the defendant and the weapon and a nexus between the weapon and the offense, particularly in the case of continuing constructive possession of drugs. *Id.* at 140, 142. Again, the weapon must not simply be present, but must be present “to be used” in the commission of the crime. *Id.* at 138.

In this case, the evidence showed Mr. Bergstrom was sitting in the backseat of a messy vehicle after dark, near what appeared to be a firearm. The State presented no evidence that the gun was an actual firearm, that it was loaded, or that it could be used against someone. Mr. Bergstrom did not reflect awareness of its presence or any intention to use the alleged

firearm. Finally, no evidence was presented that the gun *had ever* been in Mr. Bergstrom's presence before or after the incident, much less that it was there to be used in the commission of the crime of possession with intent to deliver. *See Gurske*, 155 Wn.2d at 143.

The "circumstances under which the weapon was found" are compelling as they suggest that Mr. Bergstrom and the other occupants were using heroin as part of a social encounter. Deputy Tyler testified that Mr. Bergstrom appeared under the influence at the time, sweating and moving lethargically. RP 182. Small amounts of heroin were discovered in both the front seat of the car and the pouch that contained the methamphetamine. The State declined to call either the driver or passenger at trial to establish a drug sale. Nor was Mr. Bergstrom charged with delivery or attempted delivery of methamphetamine.

The State clearly failed to establish a nexus between the alleged firearm and possession with intent to deliver, and this Court should reverse the firearm enhancement and remand for resentencing. *Gurske*, 155 Wn.2d at 144.

**5. Mr. Bergstrom received ineffective assistance of counsel when his attorney failed to request an exceptional downward sentence.**

*a. Mr. Bergstrom is entitled to effective assistance of counsel.*

Defendants in criminal proceedings have a constitutional right to effective assistance of counsel. *See* U.S. Const. amend. VI; Const. art. I, § 22. That right is denied where counsel’s performance is deficient and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Mr. Bergstrom’s case satisfies both prongs.

Although there is a presumption of competence, “[w]here an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney’s performance is constitutionally deficient.” *State v. Kylo*, 166 Wn.2d 856, 862-83, 215 P.3d 177 (2009); *see also Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014). Failure to cite or argue relevant caselaw supporting an exceptional downward sentence constitutes ineffective assistance of counsel. *State v. McGill*, 112 Wn. App. 95, 102, 47 P.3d 173 (2002).

*b. Defense counsel was not familiar with the applicable caselaw and failed to act as a meaningful advocate.*

Here, defense counsel erroneously told the court that it lacked the authority to impose a downward exceptional sentence. Further, counsel was unprepared for the hearing and repeatedly argued against his client’s interest.

Despite the seriousness of the case and repeated requests by the trial court, defense counsel did not submit a sentencing brief. Instead, counsel began his oral presentation by stating that he did not want “to take up a lot of time.” 7/18/19 RP 14. Bewildered, the court emphasized the high stakes and questioned why counsel had not presented an argument in favor of a downward exceptional sentence. 7/18/19 RP 14, 17-18. In response, defense counsel suggested the possibility of continuing the hearing, “and, boy, I will write the brief, do whatever I have to.” 7/18/19 RP 18. When discussing possible continuance dates, counsel appeared to hedge, noting that “I hate writing, but I talked myself into extra work, and I will do it. ... I will get it worked out somehow. I will do it.” RP 20-21.

In fact, defense counsel did not write a brief. 7/25/19 RP 4. Instead, claiming to have “researched and researched and researched,” counsel argued the court lacked the authority to impose an exceptional downward sentence because (1) “[w]ith the felony enhancement on the firearm, I do not believe at all that the court can give a downward departure based on that,” and (2) the Sentencing Reform Act (SRA) precludes a downward exceptional sentence for the sole purpose of imposing community custody. RP 3, 5, 17-18. Counsel was wrong on both counts.

First, although the court does not have discretion to reduce the 36-month enhancement, the existence of the enhancement does not preclude a court from imposing an exceptional downward sentence for the underlying conviction. *See* RCW 9.94A.533. Second, the requirement under RCW 9.94A.701(9) that courts first reduce community custody where a standard-range sentence exceeds the statutory maximum does not apply to exceptional sentences.<sup>7</sup> *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 217, 340 P.3d 223 (2014). Once a court has imposed an exceptional sentence, it has “all but unbridled discretion” in fashioning the structure and length of an exceptional sentence. *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013).

In this case, the imposition of 84 months for the underlying offense of possession with intent to distribute ***was itself an exceptional downward sentence*** as it was below Mr. Bergstrom’s standard range of 100-120 months. Once imposed, the trial court retained discretion to fashion the sentence accordingly, including imposing a sentence further below the standard range or community custody as a portion of that sentence. An exceptional downward sentence imposed on other bases would have similarly allowed for a mixed sentence of confinement and community

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<sup>7</sup> Defense counsel did not cite a specific statutory section in arguing a court could not reduce a sentence in order to impose community custody, but was presumably referring to RCW 9.94A.701(9).

custody. In short, the court’s desire to impose community custody does not – as argued by defense counsel – preclude the imposition of an exceptional sentence.

Had counsel performed the necessary research, it would have become clear that the facts of Mr. Bergstrom’s case supported an argument in favor of an exceptional sentence on at least two other grounds. Specifically, the legislature has granted a sentencing court the authority to impose an exceptional mitigating sentence where “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.”<sup>8</sup> RCW 9.94A.535(1)(g); *see also State v. Graham*, 181 Wn.2d 878, 337 P.3d 319 (2014) (the underlying purposes of the SRA are a valid basis for mitigating harsh sentences required by the multiple offenses policy).

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<sup>8</sup> RCW 9.94A.010 lists seven policy goals the legislature intends the SRA to advance:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

In Mr. Bergstrom's case, the multiple offense policy required that all current convictions be treated as prior convictions for determining his offender score and, thus, the standard-range sentence. RCW 9.94A.589(a). This resulted in an offender score of 7, with a standard range of 100 to 120 months. RCW 9.94A.517. Had the current offenses not been counted as priors, Mr. Bergstrom's standard sentence range would have decreased to 68 to 100 months. RCW 9.94A.517. There was clearly a basis for defense argue that an exceptional sentence was warranted under nearly every identified purpose of the SRA. Mr. Bergstrom was sentenced to confinement for both the underlying possession of a firearm and the consecutive firearm enhancement based upon mere proximity to a single alleged weapon. Given Mr. Bergstrom's addiction and the underlying facts, an exceptional sentence would have allowed him to improve himself, thereby reducing his risk of reoffending and protecting the public, would have promoted a just and commensurate sentence, and would have made frugal use of the government's resources. RCW 9.94A.010.

Additionally, counsel could have argued that that mitigating factors listed in RCW 9.94A.535(1) are "illustrative only and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1). An exceptional sentence is appropriate when the circumstances of the crime distinguish it from other crimes in the same

statutory category. *State v. Murray*, 128 Wn. App. 718, 722, 116 P.3d 1072 (2005); *Graham*, 181 Wn.2d at 886 (“The legislature recognized it could not craft a standard range that could account for all factual variations underlying offenses and offenders. It adopted .535 as a safety valve.”). Thus, the underlying facts of an offense can provide a valid, non-statutory basis for an exceptional downward sentence. *See, e.g., State v. Garcia*, 162 Wn. App. 678, 256 P.3d 379 (2011) (trial court properly imposed exceptional downward sentence for failure to register as a sex offender based upon defendant’s transportation difficulties and attempts to comply with reporting obligations); *State v. Alexander*, 125 Wn.2d 717, 726-28, 888 P.2d 1169 (1995) (trial court properly imposed exceptional downward sentence based upon unusually small amount of controlled substance).

Here, the nature of Mr. Bergstrom’s conduct was limited and distinguishable from others in the same category. The totality of the evidence established Mr. Bergstrom was sitting in the backseat of a car, using drugs as part of a social encounter. Although the jury apparently believed that Mr. Bergstrom had dominion and control over the alleged firearm and the black zippered pouch in the footwell, this was not a situation in which Mr. Bergstrom was using a weapon to protect his contraband or a drug operation; he was merely proximate to two, distinct

items. The social context, Mr. Bergstrom's conduct, and the tenuous evidence distinguish this case from the legislatively-envisioned offense of possession with intent to distribute while armed with a firearm.

While it would have ultimately been up to the trial court to determine whether these factors were sufficient to justify an exceptional downward sentence, it was incumbent on counsel to recognize the possible bases and at least *attempt* to argue in favor of an exceptional downward sentence. Instead, counsel's arguments reflect a priority for self-preservation made at Mr. Bergstrom's expense.<sup>9</sup> Far from being appraised of the law, counsel closed the door on the trial court's desire to impose an exceptional sentence.

*c. Counsel's deficient performance prejudiced Mr. Bergstrom, requiring remand for resentencing.*

Defense counsel's argument that there was no basis for the court to impose an exceptional downward sentence clearly prejudiced Mr. Bergstrom. Where counsel is ineffective for failing to argue for an exceptional downward sentence, remand is proper if the "trial court's comments indicate it would have considered an exceptional sentence had

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<sup>9</sup> Counsel continued to erroneously and needlessly undermine Mr. Bergstrom in other aspects of sentencing: while noting Mr. Bergstrom and appellate counsel's objections to the requirement that Mr. Bergstrom register as a felony firearm offender and certain conditions of community custody, defense counsel took it upon himself to inform the court that he did not personally agree with the objections. 7/25/19 RP 20-22.

it known it could.” *McGill*, 112 Wn. App. at 100. The record need only establish “the possibility” that the court would have imposed a different sentence. *See State v. McFarland*, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017).

Here, the court repeatedly expressed a desire to impose an exceptional downward sentence and was clearly open to any arguments by defense counsel. Indeed, the court continued sentencing for the specific purpose of allowing defense counsel to “brief me on whether there is some creative way for an exceptional way [sic].” 7/18/19 RP 19. Counsel had at least three viable arguments: (1) the resentencing already required an exceptional mitigating sentence, giving the court nearly unbridled discretion to fashion the sentence; (2) RCW 9.94A.535(1)(g) explicitly allowed for a downward sentence given the multiple offense policy; and (3) the underlying facts of the case distinguished Mr. Bergstrom from others in his same category. It is likely that the court would have adopted at least one of these arguments.<sup>10</sup> This Court should remand the case for resentencing.

**6. The sentencing court erred in concluding that it lacked discretion to impose an exceptional downward sentence based upon Mr. Bergstrom’s history of addiction.**

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<sup>10</sup> Although the jury found Mr. Bergstrom possessed the firearm, the court’s dismissal of the charge of possession of a stolen firearm suggests the court was not convinced that Mr. Bergstrom had possession of the firearm prior to entering the vehicle.

A sentencing court errs when it “operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’” *McFarland*, 189 Wn.2d at 56. The court must recognize its ability to impose an exceptional sentence regardless of arguments made by counsel. *See id.* at 56-57. “The failure to consider an exceptional sentence is reversible error.” *State v. Greyson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Although not stated explicitly, the court in this case apparently determined that Mr. Bergstrom’s history of chemical dependency did not justify the imposition of an exceptional downward sentence. When the legislature enacted the SRA, it emphasized the importance of maintaining judicial discretion in sentencing. *State v. Houston-Sconiers*, 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, concurring). A court may rely on non-statutory factors in imposing an exceptional sentence, provided the factor (1) was not necessarily considered by the legislature in establishing the standard range sentence and (2) is sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *State v. O’Dell*, 183 Wn.2d 680, 699-700, 358 P.3d 359 (2015).

While courts have misconstrued the SRA as barring consideration of personal characteristics, including drug addiction,<sup>11</sup> it is clear that is not the case. In *State v. O'Dell*, our Supreme Court recognized that a particular defendant's age could be a mitigating factor even though it does not relate to the crime or previous record of the defendant. *Id.* at 695. The court found that, even for defendants over the age of 18, a sentencing court may look to the characteristics of a particular defendant's youth to determine whether youth diminished that defendant's culpability. *Id.* at 696. *Matter of Light-Roth* confirmed that *O'Dell* did not constitute a substantial change in the law; trial courts have always had the ability to consider an individual's age to the extent that it bears on culpability. 191 Wn.2d 328, 336, 422 P.3d 444 (2018).

Like youth, addiction biologically impairs a person's judgement, increasing impulsive behavior and decreasing an understanding of future consequences. When addiction damages the brain, "it limits the brain's ability to control other behavioral systems." A. Tom Horvath, Ph.D., ABPP, et al., *Impulsivity, and Compulsivity: Addictions' Effect on the Cerebral Cortex*, CenterSite.net,

[https://www.centersite.net/poc/view\\_doc.php?type=doc&id=48374&cn=1](https://www.centersite.net/poc/view_doc.php?type=doc&id=48374&cn=1)

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<sup>11</sup> E.g. *State v. Gaines*, 122 Wn.2d 502, 517, 859 P.2d 36 (1993).

408 (last visited Sept. 27, 2019). For example, repeated exposure to heroin “changes the structure of the brain itself, which in turn affects its neuronal and hormonal systems.” American Addiction Centers, *The Mental Effects of Heroin: Short-Term and Long-Term*, <https://americanaddictioncenters.org/heroin-treatment/effects> (last updated June 17, 2019). It affects both decision-making abilities and the ability to regulate behavior. *Id.*; National Institute on Drug Abuse, *What are the long-term effects of heroin use?*, <https://www.drugabuse.gov/publications/research-reports/heroin/what-are-long-term-effects-heroin-use> (last updated June 2018).

Taking addiction into account in sentencing would also mirror the approach adopted in federal courts, which distinguish the initial voluntary use of drugs from the physiological changes occurring after long-term use based upon “fundamental differences between the addict and non-addict brain.” *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1175 (N.D. Iowa 2014) (drug addiction impacted defendant’s culpability, warranting exceptional sentence); *United States v. Walker*, 252 F. Supp. 3d 129 (D. Utah 2017) (same).

As with youth, addiction need not be a *de facto* mitigating factor. However, a sentencing court must consider whether, given a defendant’s particular history, the drug at issue, and the alleged conduct, addiction

impacted culpability such that an exceptional downward sentence is appropriate. *O'Dell*, 183 Wn.2d at 698-99. Indeed, Washington courts have already recognized that voluntary intoxication, while not excusing criminal conduct, may diminish culpability. *See, e.g., State v. Mriglot*, 88 Wn.2d 573, 564 P.2d 784 (1977) (discussing differences between involuntary and voluntary intoxication defenses).

Here, the court wrongly concluded that there were no circumstances that would justify an exceptional sentence despite believing that the offense was directly related to Mr. Bergstrom's drug addiction and that long-term incarceration would not meet Mr. Bergstrom's rehabilitative needs. 7/25/18 RP 15. Given the purpose of the SRA and an evolving understanding of the impact of long-term use on a defendant's brain functioning, the trial court should have exercised its discretion to impose an exceptional downward sentence.

**7. The sentencing court abused its discretion in imposing the felony firearm registration requirement**

The sentencing court abused its discretion by requiring Mr. Bergstrom to register as a felony firearm offender without considering all the factors required by statute. Under RCW 9A.41.330, courts must consider three factors in deciding whether to impose the registration requirement: (1) criminal history; (2) prior findings of not guilty by reason of insanity;

and (3) “[e]vidence of . . . propensity for violence that would likely endanger persons.” RCW 9.41.330(2) (“In determining whether to require the person to register, the court *shall consider all relevant factors*, including, but not limited to . . .”) (emphasis added).

This Court recently addressed the issue in *State v. Stewart*, 9 Wn. App. 2d 1035, 2019 WL 2515968 (2019).<sup>12</sup> In *Stewart*, the judgment and sentence allowed the trial court to check boxes indicating which factors it considered in imposing the requirement. *Id.* at \*3. In ordering the defendant to register, the sentencing court checked only the box stating that it had considered “the Defendant’s criminal history.” *Id.* Because the court failed to consider the remaining, mandatory factors, remand was warranted. *Id.* at \*8.

The same applies here. Both the original and amended judgment and sentence reflect that the court considered only one of the mandatory factors. Specifically, the court only checked off “The Defendant’s criminal history” while leaving the other two mandatory factors blank. The record confirms that the court considered Mr. Bergstrom’s criminal history, without mentioning the remaining two factors. RP 340. Notably, although Mr. Bergstrom has twice been convicted of possessing firearms, one

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<sup>12</sup> Unpublished opinions of the Court of Appeals issued after March 1, 2013, may be cited as persuasive authority. GR 14.1(a).

conviction is nearly 20 years old, his criminal history does not reflect violent offenses or use of a firearm during the commission of a crime, and the majority of his prior crimes are drug offenses. The court abused its discretion in ordering Mr. Bergstrom to register as a felony firearm offender without considering all of the mandatory factors required by statute, requiring remand. *Id.* at \*8.

**8. The community custody conditions are unconstitutionally vague and impermissibly infringe on Mr. Bergstrom's fundamental rights.**

As part of Mr. Bergstrom's sentence, the trial court imposed several community custody conditions that are unrelated to the underlying offense and impermissibly infringe upon Mr. Bergstrom's constitutional rights, in clear excess of the court's authority. *See* RCW 9.94A.703(f). Community custody conditions are reviewed for an abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Unlike statutes, a sentencing condition is not presumed valid. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Discretionary community custody conditions must be "crime-related." RCW 9.94A.703(f). Limitations on fundamental constitutional rights during community custody must be "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the state and the public order." *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374,

229 P.3d 686 (2010). Additionally, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal, and the condition must provide ascertainable standards to protect against arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, § 3; *Bahl*, 164 Wn.2d at 752-53. Community custody conditions that allow a CCO to determine the scope of the condition are unconstitutionally vague. *See id.* at 758.

*a. The condition prohibiting association with DOC-identified drug offenders should be stricken.*

The condition prohibiting Mr. Bergstrom from having contact with DOC-identified drug offenders should be stricken as an impermissible infringement on Mr. Bergstrom's constitutional right to freedom of association and as unconstitutionally vague. U.S. Const. amend. I.

Offenders on community custody retain their rights to free expression and association. U.S. Const. amend I; *see State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). Although some limitations to the right of association may be limited during community custody, such limitations must be authorized by the SRA. *Id.* In Mr. Bergstrom's case, the condition could infringe on his ability to obtain employment where any individual with a drug conviction also works. It

could limit his ability to belong to churches, fitness centers, or recreational clubs also attended by individuals with drug convictions. Importantly, there is no exception for chemical dependency treatment or sober support meetings. The condition is not necessary to accomplish the goal of punishment and does nothing to further protect the public. Rather, it risks isolating Mr. Bergstrom and preventing him from participating in programs, activities, or employment that would help him succeed and promote public safety.

Additionally, the condition prohibiting contact with anyone DOC identifies as a “drug offender” is both susceptible to arbitrary enforcement and fails to provide Mr. Bergstrom fair warning of the proscribed conduct. For example, the condition does not specify how DOC identifies “drug offenders” or how Mr. Bergstrom will be notified of the presumably constantly changing list of individuals who comprise the category. Neither the Judgment and Sentence nor the SRA even define “drug offender.” CP 141; *see* RCW 9.94A.030(35). Although the SRA defines “offender,” it is unclear whether this definition includes individuals already convicted or simply those whom DOC or Mr. Bergstrom’s CCO believe have committed a crime. It is also unclear whether a DOC violation involving drugs would elevate someone to the status of a “drug offender.” RCW 9.94A.030(35). Under these circumstances the condition does not notify

Mr. Bergstrom of what conduct, *i.e.* relationships, are prohibited and opens the door to arbitrary enforcement. This Court should strike the condition and remand for resentencing.

*b. The condition allowing Mr. Bergstrom's CCO to establish what geographical areas Mr. Bergstrom may or may not enter should be stricken.*

The condition of community custody requiring Mr. Bergstrom to remain inside and outside any geographical boundary set by his CCO infringes on Mr. Bergstrom's constitutional right to travel and is unconstitutionally vague. Additionally, without specifying any particular locations or category of locations, this condition is not crime-related. As opposed to trespass or burglary, the crime was not location-specific; there was no testimony that he was present in a high-crime area, and it did not appear as though he was present at the park to distribute methamphetamine. Using heroin during a social encounter in a parking lot does not justify allowing Mr. Bergstrom's CCO to require or prevent him from entering any area, except perhaps the parking lot in which the offense occurred.

The right to travel applies to both intrastate and interstate movement. *Eggert v. City of Seattle*, 81 Wn.2d 840, 845, 505 P.2d 801 (1973). An individual must have a "reasonable and readily available means of modifying" a condition requiring they remain outside of a

geographic boundary. *In re Pers. Restraint of Martinez*, 2 Wn. App. 2d 904, 916, 413 P.3d 1043 (2018). Modification is not readily available where a condition is subject to the complete discretion of a CCO. *Id.*

In this case, it appears as though Mr. Bergstrom's CCO could essentially banish him from any geographical area, leaving Mr. Bergstrom with no available means of challenging this exclusion. The condition is not narrowly tailored, serves no compelling government interest, and, by leaving the exclusion at the complete discretion of his CCO, impermissibly infringes upon Mr. Bergstrom's right to travel.

The condition also does not provide Mr. Bergstrom with a fair warning of the proscribed conduct. This Court addressed a similar issue in *State v. Irwin*, finding the requirement prohibiting the defendant from frequenting "areas where minor children are known to congregate, as defined by the supervising CCO" unconstitutionally vague in the absence of clarifying language or a list of prohibited locations. 191 Wn. App. 644, 655, 364 P.3d 830 (2015). Here, the condition is even vaguer; it fails to include even a category of locations, much less a list of particular locations. In giving unlimited discretion to Mr. Bergstrom's CCO, the condition also allows the CCO to impose requirements that are not crime related and/or are susceptible to arbitrary enforcement.

*c. The condition requiring Mr. Bergstrom to obey all conditions of community custody imposed by the Department of Corrections should be stricken.*

For the reason argued above, the community custody condition requiring Mr. Bergstrom to “obey all conditions of community custody imposed by the Department of Corrections” is unconstitutionally vague and should be stricken.

**9. The sentencing court abused its discretion in entering an off-limits order under RCW 10.66.020.**

As with the felony firearm registration requirement, the trial court abused its discretion when it imposed an off-limits order without entering the requisite findings. RCW 10.66.020 allows a court to enter an off-limits order “enjoining a known drug trafficker who has been associated with drug trafficking in an area that the court finds to be a PADT [“protected against drug trafficking”] area, from entering or remaining in a designated PADT area for up to one year.” A “PADT area” is defined as “any specifically described area, public or private, contained in an off-limits order. The perimeters of a PADT area shall be defined using street names and numbers and shall include all real property contained therein[.]” RCW 10.66.010(5). Under the plain language of the statute, the requirements to find the location of the offense was within a PADT area and to specify the area in the off-limits order are mandatory.

In this case, the court entered an order establishing the following areas as “off limits” while under DOC supervision: “TBD – if necessary per community corrections officer.” CP 144. In so doing, the court made no finding that the area in which Mr. Bergstrom was stopped was a PADT area and did not include any designation of a particular PADT area in which Mr. Bergstrom was enjoined from entering. CP 144. Instead, the court allowed Mr. Bergstrom’s CCO to determine whether the limitation should even apply.

Nor would the evidence have supported such a finding. There was no testimony that the park was a designated PADT area or that drug arrests or sales were frequently made near the location. In the absence of either the findings or supporting evidence, this Court should strike the off-limits order and remand for resentencing.

F. CONCLUSION

This Court should reverse Mr. Bergstrom’s convictions as unsupported by the evidence. Alternatively, this Court should remand the case for resentencing.

DATED this 9<sup>th</sup> of October, 2019.

Respectfully submitted,

s/Devon Knowles

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36381-3-III
	)	
ZACHARY BERGSTROM,	)	
	)	
APPELLANT.	)	

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