

FILED

8/29/2019
Court of Appeals
Division III
State of Washington

No. 36592-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

STEVEN BERNARD PALLETT,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Julie M. McKay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Pallett assigns error to Other Condition 13, of community placement/custody contained in Appendix H, at CP 410:

13. That you do not engage in the business of prostitution.

Issue Pertaining to Assignment of Error

Was Other Condition 13, of community placement/custody contained in Appendix H, improper where it was not supported by statute and not crime-related?

B. STATEMENT OF THE CASE

1. Procedural Facts.

Appellant Steven Pallett was charged by amended information in Spokane County with one count of first-degree rape (forcible compulsion with use or threatened use of a deadly weapon and being at said time armed with a firearm) and one count of kidnapping in the first degree (abduction while armed with a firearm). CP 94 (counts I and II respectively); RCW 9A.44.040-F; RCW 9A.40.020(1)(B)-F; RCW 9.94A.825. Pretrial proceedings including jury selection were held on November 8–9, 13–14, 2018. 11/8/18 RP 1–23; RP¹ 7–368. Trial was held before the Honorable Judge Julie M. McKay on November 14–16 and 19–

¹ The bulk of the pretrial proceedings, as well as the trial and sentencing, are found in Volumes I–IV, transcribed by court reporter Jody Dashiell. The pages are numbered consecutively, and will be referred to as “RP ____.”

20, 2018. RP 368–953. Pallett was acquitted of the kidnapping count (count II), but convicted of the rape count (count I) and found by special verdict to being armed with a firearm at the time of its commission. CP 351-52, 353.

2. Pre-trial motions - portion.

The State (*see* CP 226–231) and Mr. Pallett (*see* CP 235–243, 244–245, 246–247) each brought motions in limine. In large part they were agreed upon and to a smaller degree were modified, and the Court reserved ruling on several pending how the area of concern was actually addressed during trial. Pertinent to this appeal, the State had no objection/agreed to defendant’s following motions in limine:

...

6. To prohibit any testimony or evidence about allegations that Mr. Pallett was running a prostitution ring out of his home.
7. To prohibit any testimony or evidence about allegations from report 11-332292, that Mr. Pallett had been beating up, threatening, and ripping off other prostitutes.
8. To prohibit any testimony or evidence about allegations from report 12-383502, that Mr. Pallett was pulled over with a known prostitute in the car.
9. To prohibit any testimony or evidence about allegations from 14-398771, that Mr. Pallett paid prostitute Aubre Shults for bondage sex, and paid her less than the agreed amount.
10. To prohibit any testimony or evidence about allegations from report 14-191150, that Mr. Pallett threatened people with a pistol.

11. To prohibit any testimony or evidence about allegations from report 15-442358, that Mr. Pallett threatened a waste management employee with a pistol.

12. To prohibit any testimony or evidence about allegations from report 16-80201, that Mr. Pallett hit his wife and step son.

13. To prohibit any testimony or evidence about allegations from report 17-10053624, that Mr. Pallett threatened to shoot his neighbor with a gun during an argument.

...

CP 237–242; RP 110–111.

3. Testimony at trial - portion.

On the evening of 3/18/2017, the victim, 29-year- old Tamara B., went out to the downtown area of Spokane to prostitute herself, and began walking from where she'd parked at a 7-11 store down to Sprague Avenue. RP 479, 482–484. A heroin addict, she didn't want to get sick from lack of the drug and needed to make money that night to support her addiction, pay bills, and to provide for her two children who weren't currently living with her—one having been removed from her care. RP 479, 481, 482–483. She was using heroin this day. RP 482.

Tamara said yes when asked if she wanted a ride, and the defendant, Steven Pallett, picked her up in his silver Chevy Cavalier in the area of a car dealership near Sprague and Hatch. RP 484–486, 673. He was unknown to her at the time. RP 485. She knew she was going to solicit

herself, but at the time they hadn't spoken of it. RP 485–486. He got on the freeway, took the Argonne exit, and drove to an A-frame shack near the stables in lower Valley Mission Park. RP 390, 490.

During the drive, Tamara took off her grey sweatshirt and tan bra² and pulled down her shirt to expose her breasts, all because he told her to, and he took away her cell phone as she was attempting to text a friend, and Pallett threw the clothing and phone into the backseat. RP 411, 489, 491.

Once at the shack Pallett told her to go inside and undress. RP 493. When Tamara questioned him about payment, because usually before this point an arrangement would have been discussed but it hadn't been, Pallett respond that she wasn't getting paid. RP 493. When she indicated she didn't want to undress, Pallett retrieved a black handgun—not a revolver but looked kind of like what a police officer would have—from the front seat area of his vehicle; she felt she had no choice. RP 494–495. She went inside the shack, removed her remaining clothing and then performed oral sex on him as he demanded while holding the gun pointed at her head. RP 496–497. He refused her request to use the condom she had with her as was her custom; she thinks she may have dropped it on the floor³. RP 501,

² The sweatshirt and bra were later found by law enforcement just off the edge of the tarmac/road leading in/out of the area where the A-frame was located. RP 428, 439.

³ The condom in its wrapper was later found on the floor of the A-frame by law enforcement and collected into property. RP 435–437.

503. He ejaculated into her mouth, immediately left the shack, ran to his vehicle and drove off. RP 426, 504.

Tamara, who still had with her the panties and jeans she'd had to take off, put them on. RP 506. She went outside and climbed over the nearby fence thinking the moving cars on the other side were on the freeway (I-90), and waived her arms for anybody to stop. RP 403, 505, 507. A female who stopped to assist her called an ambulance and police arrived. RP 508. Tamara was taken to Sacred Heart Medical Center and a nurse conducted a rape examination. RP 407; 465–474.

For the next several months law enforcement conducted an investigation to identify the person who assaulted Tamara. RP passim (investigating in various places and testimony through several witnesses). In September 2017, they believed they had sufficient identifying tie-ins and arrested Pallett. *See e.g.* RP 649–651. Detectives told him what he was being arrested and interviewed for. Pallett was advised of his *Miranda* rights and agreed to talk to the detectives. RP 651–653.

Pallett told detectives that there was a woman who was asking for a ride. RP 657. He said he picked her up on Sprague, eventually acknowledging it was at the intersection of Sprague and Hatch where he'd parked on the side of the Becker Buick GMC business there, and gave her

a ride. RP 657, 659, 673. He nodded in confirmation that, “yeah,” he was the man driving a silver early 2000’s Chevy Cavalier who stopped and offered her a ride. RP 659. He said that she asked if he had any money and he told her he did not have any money and to get out of his car. RP 657. He said he kicked her out at Valley Mission Park. RP 658, 663. He initially denied that the encounter involved a prostitution transaction. RP 658, 670–671. He described the route he drove to get to the valley and Valley Mission Park. RP 660–661, 663–664. When asked if Tamara offered sexual favors for money, he responded that he told her he was not looking for that and demanded that she get out of his car. RP 662–63. He made statements about her using her cell phone during the drive but denied knowing what happened to her phone. RP 664–65. He stated he owned a Hi-Point handgun and it was currently at this house next to his bed. RP 665–666. When asked if he had the gun with him when he picked up Tamara he said he did not, and could not offer an explanation at the time for Tamara having seen and described it from that night. RP 666.⁴

⁴ Detectives of the Spokane County Sheriff’s Office executed a search warrant of Pallett’s residence/trailer on September 21, 2017, the day he was arrested. RP 595–596, 617. Det. Jeffrey Mitchell located the black Hi-Point handgun, .40 caliber, where Pallett had said it would be, next to his bed. RP 496, 604–606, 666. Det. Mitchell later verified this handgun was functional. RP 618.

Detectives confronted Pallett about prior encounters with prostitutes and after initial denial, he admitted he had been on “dates” with prostitutes in Spokane who he had picked up on Sprague. RP 669. He further responded that anyone he would have picked up, an alone woman on Sprague between Division and K-mart, would have in fact been a prostitute, and that by picking up Tamara in that very same area, he should have known she was in fact the same. RP 672.

Detectives confronted Pallett about the differences between Tamara’s and his statements, specifically about driving down to the stables area in the lower portion of Valley Mission Park. RP 667. He said he did not know how to drive down to the stables and denied being at the stables with Tamara. RP 667–668. He denied that Tamara’s phone or keys were in his car after she left but admitted that she left her sweatshirt in his car and he threw it out the window. RP 690. When detectives asked if his semen would be in her mouth, he responded that he did not remember and did not think so. RP 675. When asked if the semen form the rape kit would return to him he responded, “If she gave me a blow job, probably it might. I don’t

know.” RP 676⁵. He later admitted he received oral sex from Tamara and that the act occurred in the A-frame shack. RP 677. He knew this specific area was secluded and that there was a building there. RP 680. He continued to deny that he had the gun that night or that he threatened her with the gun, but eventually said “it could be” possible the gun was in the car that night sitting by his seat, situated in the narrow space between the outside edge of his driver’s seat and the driver’s side door, and he didn’t remember if Tamara would have seen the gun fall out when he opened the door and then put the gun back inside. RP 677–679.

In October 2017, Pallett was interviewed by a social worker on a matter regarding the welfare of his children. During that interview, Pallett talked about picking Tamara up and stated he had his gun with him that night, and that Tamara had refused to get out of his car so he threatened her with the gun. He stated she would not get out of his car so he got out his gun. RP 810–812.

⁵ A Washington State Patrol forensic toxicologist at the Cheney, Washington crime lab compared the sperm fraction of the DNA profile obtained from buccal/mouth swabs taken from Pallett [“known reference sample”] with that obtained from the sexual assault evidence kit collected from Tamara [profile from the evidence], and testified “[I]t is 1.9 octillion times more likely that the observed DNA profile occurred as a result of a mixture of Tamara Brunko and Steven Pallett than it having originated from Tamara Brunko and

4. Pre-sentence Investigation report.

A pre-sentence investigation report was filed on December 31, 2018. CP 361–371. Therein, at Section IX, CONCLUSIONS, the Department of Corrections began by stating:

The description of events in the instant offense indicates Pallett was patronizing a prostitute whom he allegedly then assaulted and threatened with a firearm.

CP 368. The Department continued, “There are additional reports alleging his involvement with prostitutes,” and referencing by date (not report number), summarized three uncharged and unproven incidents corresponding to Defense Motions in Limine 7, 8 and 9—which had previously been agreed to by the State. CP 237–239, 368; RP 110; Appendix A (match-up by undersigned counsel of motions in limine to the Department’s dates of incident references in the Pre-Sentence Investigation Report at CP 368), paragraph one.

The Department continued, referring to reports “[r]elative to [Mr. Pallett’s] risk for violence,” and again referencing only date, summarized four more uncharged and unproven incidents corresponding to Defense Motions in Limine 10, 11, 12 and 13—which also had previously been

an unrelated individual selected at random from the U.S. population.” RP 788, 792–93, 796–797, 801.

agreed to by the State. CP 239–242; 368; RP 110–111; Appendix A, paragraph two.

In Mr. Pallett’s sentencing memorandum filed January 17, 2019, defense counsel indicated, “In the Pre-Sentence Investigation, the Department was apparently unaware of the State’s stipulation concerning ER 404(b) evidence involving uncharged and unproven allegations. The Department has relied heavily on the excluded evidence in making its sentencing recommendation. The Court should not consider any unproven allegations in its sentencing decision.” Further, defense counsel objected to the usage for sentencing of any facts not proven at trial.” Statement of Counsel and Supporting Documents for Sentencing, CP 373–376, at paragraphs 6., 7.

5. Sentencing.

Defense counsel indicated in the sentencing memorandum that “Mr. Pallett’s offender score is ‘0’. As convicted, Mr. Pallett faces a standard range sentence of 93–123 months plus a 5-year weapon enhancement [yielding a total standard range of 153–183 months];” counsel sought a low-end sentence. *Id.*, CP 373 at paragraph 3. The State agreed there was no basis to depart from the standard range sentence and “concur[red] that this Court should sentence the defendant based on the

defendant's actions that were found by this jury, but the state doesn't believe that the Court ignores the information that was collected by Detective Armstrong, which led Detective Armstrong to Mr. Pallett." RP 966–967.

On January 18, 2019, Judge Julie McKay prefaced her imposition of sentence, in part with the following: "So, Mr. Pallett, I want to make sure that you understand, I have had the opportunity to review the Presentence Investigation, I did review the Statement of Counsel supporting the documents for sentencing and contesting what was contained within the Presentence Investigation, and that was the other evidence of use and abuse of prostitutes, so that objection had been noted." RP 964, 977.

Judge McKay ordered a standard-range indeterminate sentence (including 60 month firearm enhancement) of a minimum term of 168 months to a maximum term of life. CP 396–97, 383; RCW 9.94A.507. Pallett had no felony criminal history. CP 394–95.

Community custody was imposed "for any period of time the defendant is released from total confinement before the expiration of the statutory maximum." CP 398. Sentencing conditions in the Judgment and Sentence included a requirement that Pallett

[X] participate in an education program about the negative costs of prostitution. [handwritten in: “at discretion [of] CCO”]

CP 398. After considering the State’s request for this provision, the court determined it would instead leave that “up to [Pallett’s] community corrections officer” because depending on what programs he’s taken advantage of within the prison system itself, it may not be necessary by the time he gets to the community custody portion of the sentence. RP 966, 981–82.

Another sentencing condition in the Judgment and Sentence required Pallett to “abide by all conditions in Appendix H (attached) and directives of CCO.” CP 398. Appendix H, at paragraph (b), OTHER CONDITIONS, lists—as pertinent to this appeal—various conditions including the following prohibitions:

- ...
- (12) That you do not have contact with prostitutes;
- (13) That you do not engage in the business of prostitution;
- (14) That you do not go to places known for prostitution as identified by your community correction officer;
- ...
- (17) That you obey all laws.
- ...

CP 410.

The court imposed as legal financial obligations a \$500 victim assessment fee, \$100 DNA collection fee, and, reluctantly, a \$200 criminal

filing fee. RP 979–80. Based upon further information from defense counsel showing indigency, the court subsequently entered an order amending the Judgment and Sentence removing the criminal filing fee as a legal financial obligation. CP 413–414.

Mr. Pallett appealed and this pleading follows. *See* CP 415.

C. ARGUMENT

Condition 13 of Appendix H was not statutorily authorized or crime-related, and the imposition of the condition exceeded the trial court’s sentencing authority.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. *State v. Sanchez Valencia*, 169 Wn.2d 782, 786–790, 239 P.3d 1059 (2010). Challenges to sentencing conditions are ripe for review “‘if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.’” *Id.* at 786 (quoting *Bahl*. 164 Wn.2d at 751).

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

(2009). Any condition imposed in excess of a court's statutory authority is void. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

In this case, Appendix H, condition 13, was not statutorily authorized. This condition provides:

13. That you do not engage in the business of prostitution.

This condition was not authorized by statute. RCW 9.94A.703 (2018), applicable here, provides for both mandatory and "waivable" or "discretionary" conditions, which includes ordering a person to participate in "crime-related" treatment or perform other "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)(c), (d). Condition 13 is not listed, nor does it concern any type of treatment. RCW 9.94A.703. Further, condition 13 was not "affirmative conduct reasonably related to the circumstances of the offense" or reoffending or safety under RCW 9.94A.703.

Nor was it a crime-related prohibition. Under RCW 9.94A.703(3)(f), the trial court is authorized to require an offender to "[c]omply with any crime-related prohibitions." "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been

convicted.” RCW 9.94A.030(10). Directly related community custody conditions must be “reasonably crime-related” to the underlying offense. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870, *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014). While there need not be a *causal* link, there must at least be sufficient evidence showing a factual relationship between the crime being punished and the condition being imposed. *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

This court reviews a trial court’s imposition of crime-related community custody conditions for abuse of discretion. *Johnson*, 180 Wn. App. at 326; *State v. Irwin*, 191 Wn. App. 655, 656, 364 P.3d 830 (2015) (citing *State v. Cordero*, 170 Wn. App. 351, 373, 284 P.3d 773 (2012)). The factual basis supporting a crime-related condition is reviewed for substantial evidence. *Irwin*, 191 Wn. App. at 656.

As an initial matter, save for the prohibition on illegal activity (“prostitution”), the condition is both unconstitutionally vague and in violation of fundamental due process. Unlike with statutes, there is no presumption of constitutionality for community custody conditions. *See State v. Sanchez Valencia*, 169 Wn.2d 782, 792–93, 239 P.3d 1059

(2010).⁶ State and federal due process requires the state to give fair notice and warning of what conduct a person on community custody must avoid. *Bahl*, 164 Wn.2d at 752.

As a result, a condition must 1) provide sufficient notice and 2) include sufficient standard to protect against arbitrary enforcement. *Id.*; see *State v. Sansone*, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). While an exacting standard of certainty is not required, a condition must be sufficiently specific to provide an ordinary person the ability to “understand what conduct is proscribed.” *Sanchez Valencia*, 169 Wn.2d at 785. But this condition, “[t]hat you do not engage in the business of prostitution,” falls short.

While “engaging in” suggests “participating in”, what exactly is the prohibited “business of prostitution?” The phrase is not defined in the Revised Code of Washington. One source equates the “business of prostitution” with the operation of an illegal enterprise as distinguished from a legal business, “such as the real estate brokerage business or the saloon business. 48 Cal. Jur. 3d Partnership § 27.

⁶ This holding of *Sanchez Valencia* abrogated our state’s prior rule. Compare *State v. Riles*, 135 Wn.2d 326, 349, 957 P.2d (1988), overruled by *Sanchez Valencia*, 169 Wn.2d at

Another source connects the “business of prostitution” with the voluntary acts of the prostitute in ‘selling herself’ to earn money. *United States v. Beach*, 324 U.S. 193, 199, 65 S. Ct. 602, 605, 89 L. Ed. 865 (1945).

One state criminal code defines “business of prostitution” as “any arrangement between or organization of two or more persons, *acting other than as prostitutes or patrons*, who commit acts punishable under sections 609.321 to 609.324⁷ (emphasis added).” Minn. Stat. Ann .[M. S. A.] § 609.321 (West), relating to “Prostitution and sex trafficking; definitions.”

Here, the record discloses no participation by Mr. Pallett in the “business of prostitution.” There was no evidence he was operating an illegal enterprise or business relating to prostitution. There is nothing in the record to remotely suggest he was acting as a prostitute and selling himself to earn some money, or that he had any arrangement with another person(s) to commit a sex offense against a different person. He acted on his own. The incident—Mr. Pallett acting on his own to obtain personal gratification—did not occur as an “engage[ment] in the ‘business’ of

792–93.

⁷ M. S. A. § 609.322 relates to “Solicitation, inducement, and promotion of prostitution; sex trafficking.” M. S. A. § 609.323 has been repealed by Laws 1998, c. 367, art. 2, § 33. M. S. A. § 609.324 relates to “Patrons; prostitutes; housing individuals engaged in prostitution; penalties.” M. S. A. § 609.3241 relates to “Penalty assessment authorized.” M.S. A. § 609.3242 relates to “Prostitution crimes committed in school or park zones;

prostitution.”

The factual basis supporting a crime-related condition is reviewed for substantial evidence. *Irwin, supra*, at 656. For all the reasons articulated above, there is no substantial evidence of a factual basis that could support imposition of this prohibition. Condition 13 was not “crime-related” or “reasonably related” to the circumstances of Mr. Pallett’s offense. The sentencing court abused its discretion in imposing the condition and it should be stricken.

D. CONCLUSION

This Court should strike the offending community custody condition.

Respectfully submitted on August 29, 2019.

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increases penalties.” M. S. A. § 609.3243 relates to “loitering with intent to participate in prostitution.”

The description of events in the instant offense indicates Pallett was patronizing a prostitute whom he allegedly then assaulted and threatened with a firearm. There are additional reports alleging his involvement with prostitutes. On 10/23/2011, a complaint of prostitution in the area of 1st and Cowley, an area known for prostitution was received. The caller identified Pallett stating that he had been "ripping off girls out here, beating them up, and threatening them." She told police that Pallett brings his white van to that location and she works out of it for several hours most days. On 12/8/2012, Pallett was pulled over in the area of Pittsburg and East Sprague, an area known for prostitution and in the vehicle with him was a female known to police to be a prostitute. On 11/27/2014, police were flagged down in the area of East Sprague and Madelia, an area known for prostitution. The female said Pallett had solicited her for sex agreeing to pay \$100 to "tie her up and have sex", and he took her to the family bathroom at the Wal-Mart located at 5045 East Sprague where he pushed her into a wall and grabbed her breast. He then fled and threw \$8 at her. The female expressed concern that Pallett would harm a prostitute.

MIL #7

MIL #8

MIL #9

MIL #10

MIL #11

MIL #12

MIL #13

Relative to his risk for violence, Pallett was cited on 9/15/2014 with Displaying a Weapon. On 12/16/2015, police were notified that Pallett was upset with Waste Management and threatened to pull out his gun if they did not pick up his garbage. His service had been discontinued for not paying the bill. On 3/6/2016, police were dispatched to the Crossland Motel in regard to a domestic dispute. His wife, Tanya was there along with her son and their daughter; Tanya alleged that Pallett had assaulted her. He allegedly grabbed her around her neck and pushed her backwards into a door. Her son told Pallett to stop hurting his mother and Pallett allegedly punched him in the face and pushed him down onto one of the beds. He then dragged the boy to the floor and hit him several more times with a cane about his head and neck. On 4/13/2017, a concerned citizen called to report that Pallett's vehicle was disabled and blocking the lane, and when he attempted to assist, Pallett, who appeared impaired, declined assistance. On 4/30/2017, Pallett's neighbor called police to report that he had threatened to shoot the neighbor.

Relative to Pallett's lifestyle, it appears he was stabbed by his wife's son, Dominick on or about 1/5/2016. When police arrived, they described the residence where Pallett lived with his wife and children, which included their young daughter Letitia; *I observed the single-wide mobile home to be surrounded by bags of trash and garbage strewn throughout the yard and surrounding front porch. There was trash, clothes, food and animal feces covering the floor. There was so much waste and hazardous material covering the floor you could not see the carpet. Letitia was found hiding in the bathroom which did not have a working door. I could see the toilet and sink which appeared to not have been cleaned in months. The bedroom was also a disaster with clothes and trash covering the floor and bed. I observed an old box of pizza laying on the floor in the middle of the living room near the couch but had not observed any other food in the residence. There was a stack of dirty dishes and trash covering the stove which appeared to not have been used in some time and the sink was full of trash and dirty dishes. Letitia was removed from their custody.*

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 29, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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