

FILED
Court of Appeals
Division III
State of Washington
8/5/2019 10:17 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36604-9-III

STATE OF WASHINGTON, Respondent,

v.

ISABEL ROCHA, JR., Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Isabel Rocha pleaded guilty to first degree rape of a child and first degree child molestation. The trial court rejected the parties' joint request for a special sex offender sentencing alternative ("SSOSA") and instead imposed a standard range sentence followed by a lifetime of community custody. Two errors in the judgment and sentence require correction.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in providing for interest to accrue on non-restitution legal financial obligations ("LFOs").

ASSIGNMENT OF ERROR NO. 2: The condition of community custody prohibiting Rocha from frequenting parks, playgrounds, schools, or other locations frequented by minors is vague and should be modified.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether RCW 10.82.090(1) prohibits the accrual of interest on non-restitution LFOs.

ISSUE NO. 2: Whether the term "other locations frequented by minors" gives sufficient notice of the conduct that is prohibited.

IV. STATEMENT OF THE CASE

The State charged Isabel Rocha, Jr. with one count of rape of a child in the first degree and one count of child molestation in the first degree based on allegations of inappropriate sexual contact with the young daughters of neighbors. CP 1, 5. Rocha admitted having sexual contact with one child but denied the allegations of the other, and a polygraph examination tended to corroborate his denial. CP 6, RP 6. For purposes of reaching a plea agreement, the State agreed to amend the charges to reflect their commission only against the first child and Rocha agreed to entry of a no contact order protecting the second child, notwithstanding that she would not be the victim of the charges. RP 5-6. The trial court approved of the amendment and found that the agreement was in the interest of justice. RP 8. Rocha pleaded guilty to the amended charges. CP 41, RP 13-14.

Subsequently, the Department of Corrections filed a presentence investigation report detailing the allegations against both children and opposing a SSOSA. CP 58, 70. Counsel for Rocha filed an objection to the report and asked the trial court not to consider the allegations concerning the second child. CP 74. The trial court agreed and indicated it would not consider the Department's recommendation or the allegations that were not proven. RP 31-32, 33. Nevertheless, the trial court declined

to impose the SSOSA, finding that Rocha minimized his conduct, the sentence was too lenient in light of the circumstances of the offense, and was contrary to the wishes of the proven victim. RP 42-43.

Accordingly, the sentencing court imposed a low-end standard range sentence of 120 months to life, followed by a lifetime term of community custody. CP 99, 101, 102; RP 45. Conditions of community custody were set forth in an appendix to the judgment and sentence and included the requirement that Rocha not “frequent parks, playgrounds, schools or other locations frequented by minors.” CP 109, 120. The court assessed \$600 in LFOs consisting of a crime victim fee and a DNA collection fee, reserving on restitution. CP 105. A provision of the judgment and sentence states, “The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 106.

Rocha now appeals. CP 131.

V. ARGUMENT

The provision of the judgment and sentence imposing interest on non-restitution LFOs is contrary to statute and should be stricken. Further, the community custody condition requiring Rocha to avoid areas

frequented by minors is vague and unenforceable and should also be stricken.

A. 2018 revisions to RCW 10.82.090(1) eliminated interest on non-restitution legal financial obligations.

Effective June 7, 2018, the legislature revised several statutes pertaining to the imposition of LFOs on indigent defendants. Laws of 2018, ch. 269. As pertinent here, the bill amended RCW 10.82.090(1), which now includes the language: “As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.”

Rocha’s judgment and sentence was entered in January 2019, well after the amendment to RCW 10.82.090(1) came into effect. CP 114. Consequently, interest on the nonrestitution LFOs is not allowed by law. The language in the judgment and sentence providing for interest to accrue on the nonrestitution LFOs at the rate applicable to civil judgments should be stricken.

B. Because the term “locations frequented by minors” is vague and subject to arbitrary enforcement, condition 12 should be modified.

Community custody conditions are unconstitutionally vague if they fail to provide ordinary people fair warning of the proscribed conduct, or

fail to establish standards that are definite enough to protect against arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Imposing a condition that is unconstitutional is *per se* manifestly unreasonable and constitutes an abuse of the sentencing court's discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

Community custody conditions that restrict a probationer's access to children's spaces are not new and have received previous consideration from the courts. Although the Washington Supreme Court upheld a condition requiring the probationer to avoid places where children congregate and not frequent places where minors are known to congregate, it did so under a presumption of constitutionality that has since been abrogated as to vagueness challenges against community custody conditions. *State v. Riles*, 135 Wn.2d 326, 348-49, 957 P.2d 655 (1998), *abrogated by Sanchez Valencia*, 169 Wn.2d at 792.

Subsequent challenges have tended to conclude that such terms fail to sufficiently define the prohibited conduct, but Division III of this court has typically reached a contrary result. *See, e.g., State v. Irwin*, 191 Wn. App. 644, 654-55, 364 P.3d 830 (2015); *State v. Norris*, 1 Wn. App. 2d 87, 95-96, 404 P.3d 83 (2017); *State v. Wallmuller*, 4 Wn. App. 2d 698,

703-04, 423 P.3d 282 (2018), *review granted*, 192 Wn.2d 1009 (2019); *but cf. State v. Johnson*, 4 Wn. App. 2d 352, 360-61, 421 P.3d 969, *review denied*, 192 Wn.2d 1003 (2018). The Washington Supreme Court recently granted review to consider the constitutionality of a similar condition requiring that the defendant “not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” *Petition for Review, State v. Wallmuller*, no. 96313-4, *available at* 2018 WL 7202155.

In the present case, Rocha respectfully submits that the community custody condition prohibiting him from frequenting parks, playgrounds, schools, or other locations frequented by minors suffers from the infirmities recognized by the Court of Appeals in *Wallmuller*. The condition fails to provide clear and ascertainable standards to determine what it means for Rocha or minors to “frequent” a place or how to distinguish between places Rocha is and is not allowed to be, in light of the possibility that children may turn out to be present in supermarkets, churches, movie theaters, and the overwhelming majority of other public places. *See Wallmuller*, 4 Wn. App. 2d at 703. Nor does the condition provide sufficient guidance to ensure that different community corrections officers will not interpret the condition differently, subjecting Rocha to arbitrary enforcement.

Because condition 12 here suffers from the same deficiencies recognized in *Wallmuller*, this court should hold that the condition is unconstitutionally vague and strike the language “or other locations frequented by minors.”

VI. CONCLUSION

For the foregoing reasons, Rocha respectfully requests that the court STRIKE from his judgment and sentence the language imposing interest on his nonrestitution LFOs and from Appendix H to the judgment and sentence the language contained in condition 12 prohibiting Rocha from frequenting “other locations frequented by minors.”

RESPECTFULLY SUBMITTED this 5 day of August, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 5 day of August, 2019 in Kennewick, Washington.



Andrea Burkhart

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August 05, 2019 - 10:17 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36604-9
Appellate Court Case Title: State of Washington v. Isabel Rocha, Jr.
Superior Court Case Number: 18-1-00214-4

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