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No. 36951-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HARRIS,

Appellant.

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

REPLY BRIEF OF APPELLANT

Jessica Wolfe
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. Mr. Harris' claims are timely pursuant to the Rules of Appellate Procedure.

The State's primary argument is that all of Mr. Harris' claims are untimely and should not be considered by this Court. Brief of Respondent at 5–10. The State argues that Mr. Harris missed the window to challenge any provisions of his judgment and sentence because he only filed a notice of appeal following the revocation of his Drug Offender Sentencing Alternative (DOSA), which occurred almost a year after the original judgment and sentence was imposed. *Id.* at 8–9; *see also* CP 24–38, 60–63, 86–100, 122. The State's argument relies on a cramped reading of the Rules of Appellate Procedure, which must be “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a).

Under the Rules of Appellate Procedure, “[t]he appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.” RAP 2.4(b). This rule was passed in order to eliminate the need for appellants to file multiple notices of appeal in one case and then consolidate them. *See*

Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988); *see also Fox v. Sunmaster Prod., Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). Accordingly, the rule conserves judicial resources and eliminates “a trap for the unwary” by permitting review of orders not immediately appealed. *Fox*, 115 Wn.2d at 505 (quoting *Adkins*, 110 Wn.2d at 134).

“An order ‘prejudicially affects’ the decision designated in the notice of appeal where its designated decision *would not have occurred* in the absence of the undesignated ruling or order.” *Gomez v. Sauerwein*, 172 Wn. App. 370, 376–77, 389 P.3d 755 (2012) (emphasis added). In *State v. Rosenbaum*, for example, this Court held that a court order extending jurisdiction “prejudicially affected” a later order imposing restitution, because “it was the extension of jurisdiction which *enabled* the trial court to enter the later order of restitution.” *State v. Rosenbaum*, 56 Wn. App. 407, 409–410, 784 P.2d 166 (1989) (emphasis added). Similarly, in *Adkins*, the trial court’s decision to grant a mistrial was found to “prejudicially affect” the final decision designated in the notice of appeal, because a “second trial would not have occurred *absent* the trial court’s decision granting the motion for a mistrial.” *Adkins*, 110 Wn.2d at 134 (emphasis added).

Here, Mr. Harris was found guilty of drug possession and resisting arrest and was granted a Drug Offender Sentencing Alternative (DOSAs) as part of his sentence. CP 24–38, 86–100. This alternative sentence was modified and then later revoked. CP 50–52; 60–63. The revocation “would not have occurred in the absence” of the original judgment and sentence, and thus was “prejudicially affected” by it. *Gomez*, 172 Wn. App. at 376–77.

The cases cited by the State are unpublished and/or do not reference RAP 2.4(b). *See* Brief of Respondent at 5–7 (citing *State v. Kveton*, 2019 WL 6790319, 11 Wn. App. 2d 1044 (2019) (unpublished), *State v. Bell*, 2017 WL 1163139, 198 Wn. App. 1028 (2017) (unpublished) and *State v. Vandervort*, 11 Wn. App. 2d 300, 452 P.3d 1267 (2019)). The one published case the State relies on, *Vandervort*, is internally inconsistent in that it holds the appellant had one year to file a direct appeal, in direct contradiction of the standard 30-day window provided by the Rules of Appellate Procedure. *Compare Vandervort*, 11 Wn. App. at 303 with RAP 5.2(b). *Vandervort* also does not address RAP 2.4(b). Mr. Harris agrees with the State that this Court should decline to follow *Vandervort* due to its flawed reasoning. *See* Brief of Respondent at 7.

Pursuant to RAP 2.4(b), this Court may review Mr. Harris’ sentencing arguments as timely. In the alternative, this Court should

enlarge the time for Mr. Harris to file a notice of appeal of his judgment and sentence. *See* RAP 18.8(b) (an appellate court may enlarge the time to file an appeal pursuant to “extraordinary circumstances and to prevent a gross miscarriage of justice.”)

2. The condition prohibiting Mr. Harris from contact with “DOC ID’d drug offenders” is unconstitutional and may be challenged for the first time on appeal.

- a. The condition is illegal and erroneous as a matter of law and thus can be raised for the first time on appeal.

“[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), *superseded by statute on other grounds as stated in State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014). This is because a criminal defendant cannot waive the right to challenge a sentence that exceeds the sentencing court’s authority. *Matter of Schorr*, 191 Wn.2d 315, 322–23, 422 P.3d 451 (2018). This rule brings sentences into conformity with existing law and “avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.” *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993). Appellate courts also have the discretion to review any issue not preserved below. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

Contrary to the State’s assertion, a constitutional sentencing error need not be “manifest” to be reviewable on appeal. *See* Brief of Appellant at 13. Appellants are entitled to review of a community custody condition for the first time on appeal if the condition is (1) manifest constitutional error *or* is “illegal or erroneous” as a matter of law, and (2) is ripe. *State v. Peters*, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019); *see also State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (collecting cases and permitting a constitutional challenge to a community custody condition for the first time on appeal); *State v. Hearn*, 131 Wn. App. 601, 605, 128 P.3d 139 (2006) (the right to leverage a challenge “of constitutional magnitude” to a community custody condition “may be raised for the first time on appeal.”); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (“The right to challenge the conditions [of community custody] is not waived by the failure to object below.”).

Conditions that restrict an offender’s conduct upon immediate release from prison are ripe for review. *Bahl*, 164 Wn.2d at 751–52. A condition that is unconstitutional is “illegal or erroneous as a matter of law and can be raised for the first time on appeal.” *Peters*, 10 Wn. App. 2d at 587. Because the condition Mr. Harris challenges is both already restrictive of his conduct and is unconstitutional, it is properly before this Court. *See id.*

Even if Mr. Harris' challenge were not before this Court as of right, this Court may still exercise its discretion to consider his claims. *See Blazina*, 182 Wn.2d at 835; *see also* RAP 2.5(a) ("The appellate court *may* refuse to review any claim or error which was not raised in the trial court) (emphasis added). Because Mr. Harris raises a constitutional challenge to a condition that may result in additional punishment should he be found in violation, this Court should consider his claims.

- b. The condition is unconstitutional and should be stricken or modified.

At sentencing, the trial court ordered Mr. Harris to have "[n]o contact with [Department of Corrections] ID'd drug offenders except in a treatment setting." CP 30, 92; *see also* CP 34, 96. This condition is unconstitutionally vague in violation of Mr. Harris' right to due process because it does not sufficiently define the terms "contact" and "DOC ID'd drug offenders," making it difficult to determine exactly what conduct is prohibited. *See Bahl*, 164 Wn.2d at 752–53; *see also* Brief of Appellant at 5–7. The condition also does not specify if Mr. Harris must *know* that an individual has been identified as a "drug offender," permitting enforcement based on inadvertent contact. *Cf. State v. Houck*, 9 Wn. App. 2d 636, 644–45, 446 P.3d 646 (2019) (upholding a condition that prohibited only "*knowing* contact with drug users and sellers.") The

condition's lack of ascertainable standards invites arbitrary enforcement. *See Bahl*, 164 Wn.2d at 752–53.; *see also* Brief of Appellant at 4–8. Further, the condition proscribes Mr. Harris' freedom of association in a manner that is not narrowly tailored to accomplish the State's interest in preventing recidivism. *See State v. Padilla*, 190 Wn.2d 672, 678, 416 P.3d 712 (2018) (“[A] restriction implicating First Amendment rights demands a greater degree of specificity and must be reasonably necessary to accomplish the essential needs of the state and public order.”).

The State argues that the condition is constitutional, citing *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006). Brief of Respondent at 15. However, the condition in *Hearn* employed similar language to the modifications Mr. Harris argued would cure the condition's constitutional issues in his opening brief. *Compare Hearn*, 131 Wn. App. at 607 (upholding a condition instructing defendant to “refrain from *associating* with *known* drug offenders”) (emphasis added) *with* Brief of Appellant at 10 (arguing the condition could be modified to read “Mr. Harris shall not *knowingly associate* with persons *currently* involved in the *unlawful* use, sale, and/or possession of controlled substances.”) (emphasis in the original). As argued in Mr. Harris' opening brief, the case law has upheld conditions that prohibit “association”—as opposed to the vaguer term “contact”—as well as limiting the prohibition to drug users that are

“known” to the appellant. *See* Brief of Appellant at 6–7 (citing *United States v. Vega*, 545 F.3d 743, 749 (9th Cir. 2008) and *Houck*, 9 Wn. App. 2d at 644). Accordingly, *Hearn* actually supports Mr. Harris’ request for a condition modification in this case. *See also Peters*, 10 Wn. App. 2d at 595 (suggesting a similar modification).

The State also argues that “a list” of DOC-identified drug offenders is “readily available.” Brief of Respondent at 15. The State does not explain how or where such a list may be obtained. The State argues this “list” means that the condition in question will not be arbitrarily enforced by Mr. Harris’ community corrections officer. However, even if such a list is available to an officer, it is not necessarily available to Mr. Harris and thus, as an “ordinary person,” he may not know what conduct is proscribed. *See Bahl*, 164 Wn.2d at 752.

The State points to a “similar provision” upheld in *Houck*, 9 Wn. App. 2d at 645, to argue that the condition should be upheld here. Brief of Respondent at 15–16. However, the condition in *Houck* did “not explicitly require further definition or clarification from a [community custody officer],” because the condition only prohibited “the *offender’s knowing* contact with drug users and sellers.” *Houck*, 9 Wn. App. at 645 (emphasis in the original). Accordingly, this Court held, the condition provided sufficient notice to a person of “ordinary intelligence.” *Houck*, 9

Wn. App. at 645. That is not true here, where the State alleges there is a “list” of drug offenders apparently accessible by community custody officers, but not the general public. *See* Brief of Respondent at 15.

The State also argues that the condition “aids Mr. Harris in remaining sober,” thus serving the government interest of “[d]iscouraging further criminal conduct.” Brief of Respondent at 15. However, because the condition restricts Mr. Harris’ First Amendment right to freedom of association, it must be narrowly tailored to serve any government interest. *See Padilla*, 190 Wn.2d at 678. The State does not attempt to argue that the condition as currently drafted is narrowly tailored to serve this interest. As Mr. Harris argued in his opening brief, the condition ostensibly prohibits him from contact with thousands of people in Washington with a drug conviction on their record, and is thus not tailored to serve a legitimate government interest. Brief of Appellant at 8–9.

In sum, the condition is unconstitutionally vague and also infringes on Mr. Harris’ right to freedom of association. The State’s arguments to the contrary are unavailing . The condition should be stricken or modified.

3. The supervision fees and interest provision must be stricken from the judgment and sentence.

- a. The urinalysis reimbursement issue is not moot if Mr. Harris made payments.

The State avers that Mr. Harris' claims regarding urinalysis reimbursement are moot because these conditions of community custody only pertained to the now-revoked DOSA sentence. *See* Brief of Respondent at 10–11. However, the State acknowledges it is “unknown whether the pre-revocation reimbursement provisions were ever utilized by DOC.” Brief of Respondent at 11. A case is only moot if a court cannot provide relief. *In re Mines*, 146 Wn.2d 279, 283–84, 45 P.3d 535 (2002). To the extent Mr. Harris made payments, he is entitled to reimbursement, and thus the State has not demonstrated the issue is moot. *See id.*

- b. The State concedes the supervision fees and interest were improperly imposed.

The State concedes that the supervision fees (including urinalysis reimbursement) and interest on the legal financial obligations were imposed in violation of law. *See* Brief of Respondent at 16–18 (citing RCW 10.82.090, RCW 10.01.160(2), RCW 9.94A.703(2)). Accordingly, this Court should order the supervision fees and interest stricken from the judgment and sentence. *See* CP 30, 34, 92, 96.

B. CONCLUSION

For the reasons stated above, this Court should remand for resentencing.

DATED this 8th day of June, 2020.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068

Washington Appellate Project (91052)

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2711

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STEPHEN HARRIS,)	
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APPELLANT.)	

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SPOKANE COUNTY PROSECUTOR'S OFFICE		
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SPOKANE, WA 99260		

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