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Court of Appeals  
Division III  
State of Washington  
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No. 36951-0-III & 36952-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HARRIS,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## A. INTRODUCTION

Stephen Harris was convicted of two counts of possession of a controlled substance and one count of resisting arrest. He has since served his sentence of confinement. As a condition of community custody, the sentencing court ordered Mr. Harris not to have contact with any “DOC ID’d drug offenders.” This condition is unconstitutionally vague and infringes on Mr. Harris’ right to free association. Further, even though Mr. Harris is indigent, the sentencing court ordered him to pay discretionary supervision fees. The court also erroneously imposed interest on the legal financial obligations. This Court should remand for resentencing to correct these sentencing errors.

## B. ASSIGNMENTS OF ERROR

1. The sentencing court imposed a vague condition that Mr. Harris not have contact with individuals identified by the Department of Corrections (DOC) as “drug offenders,” in violation of his due process rights. U.S. Const. amend. XIV; Const. art. I, § 3.

2. The sentencing court’s imposition of the same condition infringes on Mr. Harris’ freedom of association. U.S. Const. amend. I, XIV.

3. The sentencing court erred in ordering Mr. Harris to pay discretionary legal financial obligations. RCW 10.01.160(3).

4. The sentencing court erred in imposing interest on the legal financial obligations. RCW 3.50.100(4)(b).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that citizens have fair warning of proscribed conduct and thus prohibits unconstitutionally vague laws. Here, Mr. Harris was prohibited from having any contact with DOC-identified “drug offenders.” However, this condition could encompass incidental and inadvertent contact, does not clearly define a “drug offender,” and does not require that Mr. Harris know that an individual has been identified as a “drug offender” by DOC. Is the condition unconstitutionally vague in violation of due process?

2. Any condition that impinges on the fundamental right to freedom of association must be reasonably necessary to accomplish the essential needs of the state and public order. Any condition that fails to satisfy this requirement is unconstitutionally overbroad. Here, Mr. Harris was prohibited from contact with “drug offenders,” which could be interpreted to mean anyone with a drug offense on their record. Accordingly, he was prohibited from even casual contact with thousands of people, without regard to these individuals’ actual influence on Mr. Harris to recidivate. Is the condition unconstitutionally overbroad?

3. Supervision fees are discretionary and should not be imposed on indigent defendants. The sentencing court made a finding of indigency but still imposed supervision fees. Should the supervision fees be stricken from the judgment and sentence?

4. Excluding restitution, legal financial obligations do not accrue interest. However, the sentencing court imposed interest on Mr. Harris' legal financial obligations. Should the interest provision be stricken?

#### D. STATEMENT OF THE CASE

Stephen Harris was charged and pled guilty to two counts of possession of a controlled substance and one count of resisting arrest. CP 3, 8–18, 78; Supp. CP \_\_ (Sub. No. 31); 7/17/2018 at RP 8–9. He requested and received a residential Drug Offender Sentencing Alternative (DOSA), which required him to participate in residential chemical dependency treatment for three to six months, and then serve two years on community custody. CP 29, 91; 8/1/2018 RP at 5–6. The sentencing court also imposed several conditions of community custody. CP 30, 34, 92, 96.

Mr. Harris was unable to complete the DOSA due to his sciatica, which caused him severe pain. 10/28/2018 RP 3, 7–8. Because of this, Mr. Harris was medically discharged from the required residential chemical dependency treatment program after only a few days of

treatment. 10/28/2018 RP 4. Mr. Harris explained to the court he did not ask for the medical discharge. 10/28/2018 RP 13. Mr. Harris was found to be in violation of the terms of the DOSA but was eventually permitted to return to treatment. 11/28/2018 RP 9. However, Mr. Harris left the second round of treatment of his own accord after a few days due to his ongoing medical issues not being met by the treatment facility. 6/14/2019 RP 15.

In response, the Court revoked the DOSA, ordering Mr. Harris into custody. 6/14/2019 RP 18–19. Mr. Harris has since served his period of confinement.

#### E. ARGUMENT

**1. The condition prohibiting Mr. Harris from having contact with “DOC ID’d drug offenders” is unconstitutionally vague and interferes with Mr. Harris’ freedom of association.**

“A trial court abuses its discretion if it imposes an unconstitutional condition” of community custody. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Although sentencing courts are permitted to order a defendant to “[r]efrain from direct or indirect contact with” “a specified class of individuals,” these conditions of community custody must comport with constitutional requirements. RCW 9.94A.703(3)(b); *Padilla*, 190 Wn.2d at 677. Here, Mr. Harris was ordered to have “[n]o

contact with DOC [Department of Corrections] ID'd [identified] drug offenders except in a treatment setting." CP 30, 92; *see also* CP 34, 96 ("Defendant shall have no contact with: DOC ID'd drug offenders.")<sup>1</sup>

This condition is both unconstitutionally vague in violation of due process and infringes on Mr. Harris' First Amendment right to free association. Unconstitutional conditions are not presumed valid and may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744–45, 753, 193 P.3d 678 (2008); *State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).

- a. The condition is unconstitutionally vague in violation of due process.

Due process requires that citizens have fair warning of proscribed conduct and thus prohibits unconstitutionally vague laws. U.S. Const. amend. XIV; Const. art. I, § 3; *Bahl*, 164 Wn.2d at 752. A condition is unconstitutionally vague if it (1) "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or (2) "does not provide ascertainable standards of

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<sup>1</sup> Mr. Harris pled guilty and was sentenced to charges in two separate case numbers. *See* 7/17/18 RP at 8 (pleading guilty to charges in both cases); 8/1/18 RP at 5 (sentencing on both cases). Accordingly, there are two judgments and sentences that contain the same sentence. CP 24–38 (judgment and sentence for Case No. 18-1-01866-9, COA No. 36951-0-III); CP 86–100 (judgment and sentence for Case No. 17-1-04055-1, COA No. 36952-8-III); *see also* CP 62 (revoking DOSA and imposing concurrent sentence for both cases). Mr. Harris cites to both judgments and sentences where relevant.

guilt to protect against arbitrary enforcement.” *Id.* at 752–53 (internal citations and quotation marks omitted). “Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded.” *Id.* at 754 (citations and quotation marks omitted).

First, the condition’s prohibition on *any* contact with DOC identified “drug offenders” is unconstitutionally vague, as it could encompass incidental and inadvertent contact. *Cf. United State v. Vega*, 545 F.3d 743, 749 (9th Cir. 2008) (noting that the term “association” does not include incidental contact and is thus not unconstitutionally vague); *State v. Houck*, 9 Wn. App. 2d 636, 644, 446 P.3d 646 (2019) (citing *Vega*).

Second, the condition does not define “drug offenders,” leaving this term open to several interpretations. The condition could be read to include anyone convicted of a drug offense. However, it could also be intended to prohibit Mr. Harris from contact with repeat drug offenders, or individuals with drug histories known to DOC, or some other subjective definition imposed by Mr. Harris’ assigned community custody officer (CCO). Accordingly, the condition does not provide Mr. Harris with adequate definiteness of exactly what conduct is prohibited. *Bahl*, 164 Wn.2d at 752–53. The condition further invites arbitrary enforcement by

leaving it up to the CCO to determine which individuals Mr. Harris is prohibited from contacting. *See id.*; *Houck*, 9 Wn. App. 2d at 644 (a condition that “explicitly require[s] further definition or clarification from a CCO” may lead to arbitrary enforcement).

Further, the condition prohibits Mr. Harris from contact with “DOC ID’d drug offenders,” but does not require that Mr. Harris *know* that an individual has been identified as such by DOC. CP 30, 34, 92 96. In order to resolve vagueness issues concerning a defendant’s mental state, a condition of community custody must set out the mental element explicitly so as to provide notice and avoid arbitrary enforcement. *See Valencia*, 169 Wn.2d at 794. For example, in *Houck*, this Court held that a condition prohibiting contact with “known” drug users and dealers was not unconstitutionally vague. 9 Wn. App. 2d at 645. This Court reasoned that a condition that prohibits “the *offender’s knowing* contact” “provides fair warning of proscribed conduct and meaningful guidance to protect against arbitrary enforcement.” *Id.* (emphasis in the original).

Here, the condition is unconstitutionally vague as it fails to provide notice to Mr. Harris of what conduct is proscribed and also invites arbitrary enforcement. *Bahl*, 164 Wn.2d at 752. The condition should be stricken or modified.

b. The condition's restriction on Mr. Harris' freedom of association is overbroad.

The fundamental right to freedom of association is protected by the First Amendment. U.S. Const. amends. I, XIV. Although an individual's fundamental rights can be restricted pursuant to a condition of sentencing, these limitations must be "imposed sensitively." *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). "A law is unconstitutionally overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment." *State v. Riles*, 135 Wn.2d 326, 346–47, 957 P.2d 655 (1998), *abrogated on other grounds by Valencia*, 169 Wn.2d at 792; *accord State v. Moultrie*, 143 Wn. App. 387, 398–99, 177 P.3d 776 (2008).

The right to freedom of association protects choices to enter into and to maintain certain human relationships. *See Moultrie*, 143 Wn. App. at 399 & n.21. Any restriction on this freedom "must be narrowly tailored to further the State's legitimate interest." *Padilla*, 190 Wn.2d at 678. Accordingly, conditions of community custody that restrict a defendant's association with others "must be reasonably necessary to accomplish the essential needs of the state and public order." *Id.*; *accord Moultrie*, 143 Wn. App. At 399.

Here, the condition's language ostensibly prohibits contact with *anyone* with a drug offense on their record. CP 30, 34, 92, 96. Under this

interpretation, the condition prohibits Mr. Harris from even casual contact with thousands of people in Washington. *See Padilla*, 190 Wn.2d at 678. In 2018 alone, there were approximately 11,916 arrests for drug crimes in Washington.<sup>2</sup> Despite this broad prohibition, the condition disregards that many people convicted of a drug offense go on to live productive, crime-free lives. *See, e.g., Matter of Simmons*, 190 Wn.2d 374, 398, 414 P.3d 1111 (2018) (noting that individuals convicted of felonies, including drug offenses, have the “ability to change if he or she has the will and opportunity to do so.”)

Accordingly, the condition restricts Mr. Harris’ freedom of association without regard to these individuals’ actual influence on Mr. Harris to recidivate. *Cf. Matter of Brettell*, 6 Wn. App. 2d 161, 170, 430 P.3d 677 (2018) (upholding a condition interpreted to prohibit contact with *current* “users and sellers”). Because the condition is not necessary to “accomplish the essential needs of the state and the public order” it is unconstitutional and must be stricken or modified. *See Padilla*, 190 Wn.2d at 678.

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<sup>2</sup> Washington Association of Sheriffs and Police Chiefs, 2018 Crime in Washington Annual Report 50 (2018), *available at* <https://www.waspc.org/assets/CJIS/2018%20ciw.pdf> (last accessed March 6, 2020).

c. The condition should be stricken or modified.

Because the condition is unconstitutionally vague and overbroad, it must be stricken or modified. If this Court elects to remand for modification of the condition, Mr. Harris suggests it be modified to read as follows: “Mr. Harris shall not *knowingly associate* with persons *currently* involved in the *unlawful* use, sale, and/or possession of controlled substances.” *See State v. Peters*, 10 Wn. App. 2d 574, 595, 455 P.3d 141 (2019) (suggesting similar language) (unpublished portion of opinion).<sup>3</sup>

**2. The supervision fees must be stricken as Mr. Harris is indigent.**

As the sentencing court found, Mr. Harris is indigent and lacks the ability to pay legal financial obligations. 8/1/18 RP 5; *see also* CP 30, 92. Accordingly, the sentencing court waived the discretionary \$200 filing fee. 8/1/18 RP 5. However, the sentencing court also ordered Mr. Harris to “pay the statutory rate to DOC, while on community custody, to offset the cost of urinalysis.” CP 30, 92. The court also ordered Mr. Harris to “pay supervision fees as determined by DOC.” CP 34, 96. This was in error.

The supervision costs of community custody are discretionary and are subject to an ability to pay inquiry. *See State v. Lundstrom*, 6 Wn.

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<sup>3</sup> Mr. Harris cites *Peters* as persuasive authority pursuant to GR 14.1.

App. 2d 388, 396 n.3, 429 P.3d 116 (2018); RCW 9.94A.703(2)(d) (“Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.”); RCW 10.01.160(3) (“The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent.”). Consistent with the sentencing court’s waiver of other discretionary costs, this court should strike the costs of supervision. CP 30, 34, 92, 96; *State v. Reamer*, 2019 WL 3416868 at \*5, 9 Wn. App. 2d 1077 (Jul. 29, 2019) (unpublished)<sup>4</sup> (holding supervision fees should not be imposed on indigent defendants).

**3. The sentencing court erroneously imposed interest on the legal financial obligations.**

The judgments and sentences include provisions stating “[t]he 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 32, 94. However, legal financial obligations, excluding restitution, do not accrue interest. RCW 3.50.100(4)(b). Accordingly, this

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<sup>4</sup> Mr. Harris cites to *Reamer* as persuasive authority pursuant to GR 14.1

Court should order the sentencing court to strike the interest accrual provisions.

F. CONCLUSION

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

DATED this 6th day of March, 2020.

Respectfully submitted,

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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. 36951-0-III
	)	
STEPHEN HARRIS, JR.,	)	
	)	
APPELLANT.	)	

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# WASHINGTON APPELLATE PROJECT

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