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36951-0-III
(Consolidated w/36952-8-III)

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEPHEN HARRIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S 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).

II. ISSUES PRESENTED

1. Were the defendant's claims waived by his failure to assert them within 30 days of the entry of the original judgment and sentence, and did the subsequent entry of an order revoking the defendant's DOSA sentence "re-impose" the community custody and LFO provisions of the original judgment?
2. Is the defendant's claim pertaining to the requirement he pay DOC to offset the cost of urinalysis monitoring moot where the defendant is no longer subject to the terms of the DOSA sentence?

3. Are the defendant's community custody challenges waived where they were not asserted below and are not manifest constitutional errors?

4. Assuming this Court reviews the defendant's community custody claims, is the community custody provision requiring the defendant not associate with "DOC identified drug offenders" unconstitutionally vague and does it infringe upon defendant's right to free association?

5. If this Court reaches the LFO claims, may the matter be remanded to strike the provisions without resentencing?

III. STATEMENT OF THE CASE

This appeal involves two consolidated cases. In Superior Court case number 17-1-04055-1, the State charged the defendant with one count of possession of a controlled substance - methamphetamine, and one count of resisting arrest. CP 78. In Superior Court case number 18-1-01866-9, the State charged the defendant with possession of a controlled substance – methamphetamine and fourth degree assault. CP 3.

On July 17, 2018, the defendant pleaded guilty to both charges under case number 17-1-04055-1. CP 134-144. Also on that date, the defendant pleaded guilty to possession of controlled substance under case number 18-1-01866-9 and the fourth degree assault was dismissed. CP 6-18. The

defendant was notified at his plea hearing of his limited right to appeal after a guilty plea. 7/17/18 RP 5.

On August 1, 2018, the court sentenced the defendant on all three charges, imposing a residential DOSA sentence on both counts of possession of a controlled substance. CP 24-38, 86-98. In addition to imposing numerous community custody conditions, CP 34, 96, the court ordered the defendant to pay the $500 victim assessment on each case, CP 30, 92, waiving other LFOs because the defendant was indigent. The original judgments also included language that the LFOs would accrue interest, CP 32, 94, and that the defendant was to pay (1) the statutory rate to DOC to offset the cost of urinalysis, CP 30, 92 and (2) "supervision fees as determined by DOC," CP 34, 96. In the defendant's judgments, he was advised of his right to appeal. CP 34, 96.

Mr. Harris struggled to comply with the terms of the DOSA sentence. CP 39-48, 101-06. As a result, the Court modified the defendant's sentence and he was ordered to strictly comply with the modification. CP 50-52, 108-10. In December 2018, he was again alleged to have violated the terms of his sentence. CP 54-58, 112-14.

On December 6, 2018, the court issued a failure to comply bench warrant for the defendant's arrest. Sub No. 54, 48.[1] The warrant was served upon the defendant on June 4, 2019. Sub No. 55, 49.

On June 14, 2019, the court held a hearing to determine whether it would revoke the defendant's DOSA sentences. CP 60-62, 118-20. The State requested Mr. Harris be terminated from the program. CP 59, 117. The defendant stipulated to a willful violation of the DOSA conditions, and the court ordered revocation of the alternative sentence. CP 61-62, 119-20. The court imposed one year and one day on both counts of possession of a controlled substance, to be served concurrently. CP 62, 120. Additionally, the court imposed 12 months of community custody "subject to the same conditions specified in Section 5.4 of the original judgment and sentence." CP 62, 120. At the revocation hearing, there was no other specific mention of the community custody conditions and no objection to either the community custody conditions or to the LFOs. 6/14/19 RP at *passim*. The only mention of LFOs was that "LFOs have been previously requested." 6/14/19 RP 20. The court's revocation order included a "catch-all"

[1] Filed herewith is a supplemental designation of clerk's papers directing the superior court clerk to forward the orders for bench warrant and sheriff's returns of bench warrants for each case. Because it is impossible to determine what CP numbers they will contain, they will be referred to by the Superior Court Sub number, with the 17-1-04055-1 case Sub number listed first and the 18-1-01866-9 case second for each document.

provision stating: "All other terms and conditions of the original judgment and sentence in the above case remain in full force and effect." CP 62, 120.

The defendant filed a notice of appeal on July 12, 2019. CP 64, 122. That notice indicated that Mr. Harris sought review of the "Order Revoking the DOSA sentence." *Id*.

IV. ARGUMENT

A. DEFENDANT'S CLAIMS ARE UNTIMELY.

The defendant claims that the trial court erroneously imposed a vague or overbroad community custody condition. He further argues that certain LFO provisions were improperly imposed – namely, boilerplate language permitting the accrual of interest on his non-restitution LFOs, and the requirement that he pay supervision fees to DOC as determined by DOC, as well as make payments to offset the cost of urinalysis.

The first flaw in the defendant's argument is that his challenges are untimely. Unless another time limit applies, an appeal must be filed within 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed. RAP 5.2(a). Thus, a timely appeal of the *judgment* should have been filed by August 31, 2018. *See also, State v.*

Kveton, 2019 WL 6790319, 11 Wn. App. 2d 1044 (2019) (unpublished)[2] ("Because Ms. Kveton's LFOs were not imposed or re-imposed at her DOSA revocation hearing, the LFOs are not before the court as part of Ms. Kveton's notice of appeal. Ms. Kveton had 30 days from her October 14, 2016, sentencing to appeal her LFOs. RAP 5.2(a)(1). Since she did not do so, her appeal is untimely and must be dismissed"); *State v. Bell*, 2017 WL 1163139, 198 Wn. App. 1028 (2017) (unpublished)[3] ("Bell's time to file an appeal started running on December 10, 2014, when the judgment and sentence was entered. RAP 5.2(c); CR 58. He did not appeal until February 23, 2016. Though the superior court should have inquired into Bell's ability to pay at his sentencing, Bell failed to timely appeal, barring his claims. Because Bell did not make a timely appeal, we dismiss it"); *but see State v. Vandervort*, 11 Wn. App. 2d 300, 452 P.3d 1267 (2019).

In *Vandervort*, Division Two stated, the "State argues that the challenge to the LFOs is untimely because Vandervort filed a notice of appeal well beyond 30 days after the original DOSA sentence. Vandervort argues that the appeal is timely because we granted an extension of time to

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[2] Pursuant to RAP 14.1(a), a party may cite to an unpublished opinion after March 1, 2013 as nonbinding authority without precedential value; the court may afford it whatever persuasive value is deemed appropriate.

[3] *See* n. 2 above.

file the notice of appeal. We agree with the State." 11 Wn. App. 2d at 302. However, *Vandervort* appears to suffer an internal inconsistency because although the court noted that the time limit to file an appeal is 30 days, the court concluded its opinion by stating, "[b]ecause the time to appeal the imposition of his LFOs *had passed one year after the court imposed Vandervort's original DOSA* sentence, we dismiss the appeal as untimely." *Id*. at 303 (emphasis added). It is unclear why the Court indicated that the time to appeal LFOs was within one year[4] after the LFOs had been imposed. To this extent, this Court should decline to follow *Vandervort*. *See Matter of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018) ("[O]ne division of the Court of Appeals should give respectful consideration to the decisions of other divisions of the same Court of Appeals but one division is not bound by the decision of another division").

[4] In deciding *Vandervort*, Division Two relied on *In re Wolf*, a personal restraint petition in which a defendant also untimely challenged LFOs. 11 Wn. App. 2d at 302-303. In *In re Wolf*, the Court stated, "We hold that (1) Wolf's PRP on LFOs is time barred under RCW 10.73.090 because it was filed more than one year after the LFOs were imposed in 2008 and the trial court's revocation of the SSOSA in 2012 had nothing to do with LFOs…" *In re Petition of Wolf*, 196 Wn. App. 496, 500, 384 P.3d 591 (2016). Perhaps this is the source of *Vandervort's* one year rule, applicable to PRPs, but which appears to have been imported into a direct appeal.

Even *Vandervort* notes that in *In re Wolf*, 196 Wn. App. at 500, the court determined that because the SSOSA revocation "did not involve the LFOs imposed in 2008," and the defendant did not appeal the original sentence, the LFOs were final on the date the original sentence was entered in 2008. 11 Wn. App. 2d at 303. This is because a sentencing hearing and a revocation hearing are two different events. *Id*. At a revocation hearing, the court has already decided to sentence the defendant to prison and for how long. *State v. Canfield*, 154 Wn.2d 698, 705, 116 P.3d 391 (2005).

Here, the defendant's revocation hearing was *not* a resentencing. The hearing did not result in a new judgment and sentence. The LFOs that were imposed in the original judgment and sentence, to include any interest or reimbursement provisions, were not imposed or re-imposed during the revocation hearing. Instead, they merely remained in effect both before and after the revocation hearing. *See* 6/14/19 RP 20 ("LFOs have previously been requested"); CP 62, 120 ("All other terms and conditions of the original judgment and sentence in the above case remain in full force and effect").

Similarly, the community custody conditions which were imposed at the original sentencing were not clearly "reimposed" at the revocation hearing. At the revocation hearing, the court ordered "upon release, the defendant shall serve 12 months of community custody subject to the

conditions specified in section 5.4 of the original judgment and sentence." CP 62, 120. But, section 5.4 of the original judgment and sentence sets forth a notice as to what may occur if the defendant violated the terms of his community custody, not the conditions themselves. CP 35, 97. Instead, the community custody conditions are found in Sections 4.2 (DOSA conditions) and 4.9 (conditions after DOSA revocation) of the original judgment and sentence, imposed on August 1, 2018. Because those conditions were not "re-imposed," but rather simply remained in effect,[5] the current appeal of those conditions is also untimely.

Lastly, this Court should dismiss the appeal as untimely because the defendant knowingly, voluntarily and intelligently waived the right to appeal his original judgment and sentence. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). At his plea hearing, he was informed of his limited right to appeal. "In a case where the judge informs the defendant at the time of sentencing of the right to appeal and the timing requirements, then the defendant's failure to timely pursue an appeal may be found to be a valid waiver." *State v. Tomal*, 133 Wn.2d 985, 990, 948 P.2d 833 (1997). His original judgment and sentence also informed him of this right and that

[5] *See* CP 62, 120 (Revocation order stating: "All other terms and conditions of the original judgment and sentence in the above case remain in full force and effect").

an appeal must be filed within 30 days after the entry of the judgment. CP 34, 96. Yet, the defendant did not seek to appeal until *after* the DOSA sentence had been revoked, and even then, his notice of appeal indicated that he sought review only of the revocation order, not the original judgment and sentence. CP 64, 122.

Because both the defendant's community custody condition and LFO claims should have been raised within 30 days of the entry of the original judgment and sentence, those claims are untimely and should not be addressed by this Court.

B. THE DEFENDANT'S CLAIM REGARDING URINALYSIS REIMBURSEMENT IS MOOT.

The defendant's 2018 judgment and sentences required that he pay the statutory rate to DOC to offset the cost of urinalysis conducted while he was supervised under the DOSA sentence. CP 30, 92. A similar provision does not appear anywhere else in either judgment or in the revocation order. Section 4.9 of the original judgments, CP 33-34, 95-96, contains the community custody provisions imposed at the original sentencing that would take effect upon the defendant's failure to complete or his termination from the alternative sentence. Although those provisions require the defendant to submit to UA/BA monitoring, they do not require the defendant to reimburse DOC for the cost of that testing.

Given the defendant's poor history of compliance with the DOSA sentence, it is unknown whether the pre-revocation reimbursement provisions were ever utilized by DOC or if Mr. Harris ever made such a payment. Certainly now, however, under the conditions applicable to post-revocation supervision, the defendant is not required to make such payments. Any claim the defendant may have had regarding the pre-revocation reimbursement provision is moot. "A case is moot if a court can no longer provide effective relief." *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983).

C. DEFENDANT'S COMMUNITY CUSTODY CHALLENGES WERE NOT PRESERVED AS THEY WERE NOT OBJECTED TO BELOW.

Assuming that the revocation order "re-imposed" the community custody conditions imposed at the original sentencing, such that those conditions are appealable from the revocation order, his community custody condition claim should still not be considered by this Court as it is unpreserved. The defendant made no objection, whatsoever, to any of the conditions "re-imposed" during the DOSA revocation (nor did he oppose any of the conditions as ordered at his original sentencing). RP at *passim*.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the

federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at 749.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Manifest error is error that resulted in actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. *Id*. To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review." *Id.* at 99-100 (emphasis added).

Although the challenges to defendant's community custody conditions are "constitutional in nature," they are not manifest. In *State v. Peters*, 10 Wn. App. 2d 574, 455 P.3d 141 (2019), this Court analyzed the

interplay of RAP 2.5, *Blazina*,[6] and *Ford*,[7] and summarized which unobjected-to community custody condition challenges are reviewable: "[F]or an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that, as *Blazina* explains, is 'illegal or erroneous' as a matter of law, and (2) it must be ripe. If it is ineligible for review for one reason, we need not consider the other." *Peters*, 10 Wn. App. 2d at 583.

As explained below, there is a wealth of authority that supports the imposition of the "DOC identified drug offender" condition. Therefore, the claim that the imposition of this condition was erroneous is not manifest, or obvious, as required by RAP 2.5, such that this Court should review the unpreserved error – an alleged error neither objected to at the original sentencing, nor at the DOSA revocation.

D. THE COMMUNITY CUSTODY CONDITION PROHIBITING THE DEFENDANT FROM ASSOCIATING WITH DOC IDENTIFIED DRUG OFFENDERS IS NEITHER VAGUE NOR INFRINGES ON DEFENDANT'S RIGHT TO ASSOCIATION.

A court reviews community custody conditions for an abuse of discretion and will reverse them only if they are "manifestly unreasonable."

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[6] *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015).

[7] *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999).

State v. Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Mr. Harris challenges his community custody condition prohibiting contact with DOC identified drug offenders. He contends the condition is unconstitutionally vague and infringes on his right to free association.

The due process vagueness doctrine under the Fourteenth Amendment to the Unites States Constitution and article I, section 3 of the Washington State Constitution "requires that citizens have fair warning of proscribed conduct." *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine assures that ordinary people can discern the prohibited conduct and gain protection against arbitrary enforcement of the laws. *Valencia*, 169 Wn.2d at 791; *Bahl*, 164 Wn.2d at 754. If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite. *Bahl*, 164 Wn.2d at 754; *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

Limitations on fundamental rights are permissible, provided they are imposed sensitively. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). An offender's freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order. *Id*. at 37-38.

In *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006), the defendant argued that a community custody condition demanding that she refrain from associating with known drug offenders violated her freedom to associate. The jury had convicted Hearn of drug possession at the trial court level. This Court affirmed Hearn's community custody condition, noting "[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders." *Id.* at 609.

Mr. Harris's sentencing court found that he suffered from a chemical dependency that contributed to his offenses. CP 25, 87. Mr. Harris suffered difficulty in remaining in drug treatment and was eventually terminated from the program. Therefore, as in *Hearn*, the court reasonably imposed a prohibition from associating with DOC-identified offenders, outside of treatment settings. This condition aids Mr. Harris in remaining sober. Discouraging further criminal conduct is a goal of community placement. *Riley*, 121 Wn.2d at 38.

An individual of ordinary intelligence can plainly understand the non-association with drug offenders condition prohibits Mr. Harris from associating with individuals the DOC labels as drug offenders. Such a list of known drug offenders is readily available. The condition does not invite arbitrary enforcement because it is not up to the individual CCO to determine who is a "DOC identified drug offender." The trial court did not

abuse its discretion in imposing this condition. *See State v. Houck*, 9 Wn. App. 636, 645, 446 P.3d 646 (2019), *review denied*, 194 Wn.2d 1024 (2020) (holding similar provision was not unconstitutionally vague and the court did not abuse its discretion in imposing such a condition).

E. IF THE DEFENDANT'S LFO ERRORS ARE REVIEWABLE, THEY MAY BE STRICKEN WITHOUT A RESENTENCING.

The defendant belatedly challenges the imposition of certain LFOs – specifically he challenges provisions that he is required to reimburse DOC for the cost of his urinalysis tests and pay supervision fees as determined by DOC. Additionally, he challenges a provision providing that interest will accrue on non-restitution LFOs.

1. Interest Provision.

As of June 7, 2018, trial courts are prohibited from imposing interest on any non-restitution legal financial obligations. Laws of 2018, ch. 269, § 1; Laws of 2018, pg. ii, "Effective Date of Laws"; RCW 10.82.090. However, the judgment and sentences in this case state: "The financial obligations imposed in this judgment shall bear interest from the date of judgment until payment in full." CP 32, 94. The original judgment was filed in August 2018, after the effective date of the law prohibiting interest on non-interest LFOs. If this Court reviews the error, this language should be corrected to indicate only restitution obligations can bear interest. This may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48,

246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).

2. Payment to Offset Urinalysis Cost.

RCW 9.94A.660(6)(a), governing DOSA community custody, permits the court to require the defendant to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances. As above, this issue is now moot because the defendant is no longer serving a sentence under RCW 9.94A.660.

Regardless, this condition does appear to be a permissive legal financial obligation – a cost associated with supervision. *See* RCW 10.01.160(2). However, as in the unpublished decision in *Bell*, *supra*, although the court should have inquired into the defendant's ability to pay (and declined to impose the cost upon a finding of indigency), the defendant is not entitled to relief because his appeal is both untimely and moot. If reviewable, the language may be stricken without a resentencing.

3. Supervision Fees.

RCW 9.94A.703(2) authorizes the court to waive supervision fees, indicating that they are a discretionary legal financial obligation of the type that may no longer be imposed on indigent defendants pursuant to the most recent iteration of RCW 10.01.160(3). Division Two endorsed this view in *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n. 3, 429 P.3d 1116 (2018),

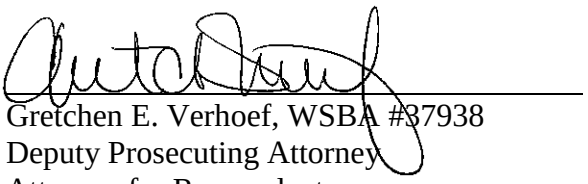
review denied, 193 Wn.2d 1007 (2019); and Division One did so in *State v. Dillon*, __ Wn. App. 2d __, 456 P.3d 1199 (2020). If this issue is reviewable, this language may be stricken without a resentencing.

V. CONCLUSION

The State respectfully requests this Court dismiss this appeal as untimely. The defendant's appeal should have been taken within 30 days of the entry of the original judgment and sentences, not from the entry of the revocation order. If this Court does review the issues presented, the trial court did not err in prohibiting the defendant from contact with DOC identified drug offenders. The LFOs may be stricken without a resentencing hearing.

Dated this 2 day of April, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef, WSBA #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. STEPHEN HARRIS, Appellant.	NO. 36951-0-III Consol. w/36952-8-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 2, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jessica Wolfe
Wapofficemail@washapp.org

4/2/2020	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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