

NO. 82731-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ISIDRO SANCHEZ VALENCIA and EDUARDO CHAVEZ SANCHEZ,
Appellants.

FROM THE COURT OF APPEALS, DIVISION II – NO. 36029-2-II
CLARK COUNTY SUPERIOR COURT CAUSE NO.
06-1-02054-5 and 06-1-02052-9

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPREME COURT
STATE OF WASHINGTON

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I. RESPONSE TO ISSUES

The issue raised on further appeal deals with a provision of the Judgment and Sentences imposing community custody and setting conditions which include the following:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand-held electronic scheduling or data storage devices.

- (Portion of Judgment and Sentence – CP 112)

This matter was appealed to Division II of the Court of Appeals concerning the issue of whether or not this condition was void for vagueness. The State, at that time, relied on State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007) which indicated that Division II felt that this argument was not ripe for review and thus refused to decide it.

After the time of oral argument, the Supreme Court issued the decision in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) which held that a pre-enforcement challenge to a community custody condition prohibiting the possession of pornographic material was ripe for review. The Supreme Court found that the pre-enforcement challenge was ripe because a prohibition on possessing pornography implicates First Amendment rights and thus, dealt with a purely legal issue that courts

could solve on the present record without the need for additional facts to aid in the court's inquiry. Bahl, 164 Wn.2d at 752-753.

Bahl further suggested that the following test for appellate courts should be used in determining whether a community custody condition challenge is sufficiently ripe for review: 1. The issues raised are primarily legal, 2. Determination of these issues requires no further factual inquiry; and 3. The challenged action is final.

Applying this test to our situation, the State submits that the defendant's challenge is not ripe for review. In Bahl, the prohibition dealt with possession of pornographic materials which implicated First Amendment rights. But here, the defendants base their vagueness challenge on a due process argument, which does not implicate the First Amendment. When a vagueness challenge does not involve a First Amendment right, the court evaluates it in light of the facts of each particular case. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). An inquiry into whether the community custody paraphernalia condition is unconstitutionally vague, as applied to defendants, is premature unless or until they can show that the conditions actually caused them harm. Because they have not yet been released from confinement and placed on community custody, they cannot show that this condition causes them harm.

Further, if a case can be decided on nonconstitutional grounds, the court should decline to consider the constitutional issues. State v. Hirschfelder, 148 Wn. App. 328, 199 P.3d 1017, 1028 (2009). The State submits that Division II was correct in not considering the community custody paraphernalia condition of the sentence as unconstitutionally vague because the issue was not ripe for review. State v. Valencia, 148 Wn. App. 302, 198 P.3d 1065 (2009).

There is a vast difference between a community custody condition, as in Bahl which barred possession of pornography and a community custody condition at issue here which prohibited possession of drug paraphernalia. The defendants cannot assert any specific facts inviting review of whether the facts dealing with possession of drug paraphernalia meet a statutory definition of drug paraphernalia under RCW 69.50.102(a) nor can they argue that they have a specific factual context in which this challenge can be reviewed. As the court in Bahl noted, “ripeness is an appropriate doctrine to apply when deciding whether a pre-enforcement vagueness is premature and applying the ripeness doctrine can help identify the cases where a more developed factual record is necessary before a decision on the constitutionality of the sentencing conditions can be made.” Bahl, 164 Wn.2d at 749.

This is apparent when we review the community custody prohibition of possessing drug paraphernalia which requires proof of the defendant's intent to use ordinary household objects to ingest or to facilitate the sale or transfer of illegal drugs. Any analysis of this intent is going to require additional factual determinations which, obviously, cannot be made while the defendants are still incarcerated. Community custody conditions will not begin to operate until the people are out of custody, operating in the real world, and, at that point, this issue may become germane if the community corrections officers decide to impose the conditions. It would only be at that stage where the defendants can suffer any type of significant hardship. If the defendants can show actual harm once they are released on community custody, they would likely have standing to file a personal restraint petition raising this issue at that time. RAP 16.4; In re Personal Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995).

As indicated by Division II in our case:

Second, Sanchez and Sanchez Valencia's community custody conditions prohibit them from processing drug paraphernalia. And, unlike pornography, a court's determination of whether Sanchez or Sanchez Valencia have been provided sufficient warning of what items they are prohibited from possessing necessarily rests on a factual record demonstrating the manner in which they used or possessed the item alleged to violate the prohibition. For example, a soda pop can used for its intended purpose is

not drug paraphernalia. But when the same soda pop can is modified for use as a pipe to ingest illegal drugs, it becomes drug paraphernalia. Thus, whether Sanchez and Sanchez Valencia's community custody condition prohibits them from possessing an item such as a can of soda pop depends on how they modify it for a different use or intend to use the item. And a reviewing court cannot make that determination without context. Because a more developed factual record is necessary to resolve Sanchez and Sanchez Valencia's vagueness challenge, they fail to satisfy the second prong of the *Bahl* issue maturity test.

Finally, because an innocent object does not transform itself into drug paraphernalia absent a person's intention to use it to ingest illegal drugs, withholding review of the constitutionality of the conditions at issue does not cause Sanchez and Sanchez Valencia significant hardship. In contrast, requiring that the trial court anticipate all future unlawful modifications or potential illegal uses of otherwise innocuous items before lawfully conditioning a convicted drug offender's release on avoiding such unlawful conduct poses a significant and likely insurmountable hardship. We agree, as the dissent suggests, that citation to statutes and infractions defining "drug paraphernalia" like RCW 69.50.102 and RCW 69.50.4121(1)(a)-(m) can assist in defining the phrase. We note, however, that, because these statutory lists are not exclusive, Sanchez and Sanchez Valencia's vagueness challenge remains. Their arguments demand an exhaustive and exclusive list of prohibited items the law does not require. Because it is not possible for the sentencing court to anticipate unlawful modifications and uses of otherwise lawful innocuous items, the validity of an alleged violation is necessary fact-based. Sanchez and Sanchez Valencia's challenge is premature and not ripe for review.

Bahl does not disturb the second limitation to vagueness challenges of community custody conditions: that "[i]mpossible standards of specificity' are not required since language always involves some degree of vagueness." 164 Wn.2d at 759 (internal quotation marks omitted)

(quoting State v. Halstein, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). And a community custody condition “is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). While a greater degree of specificity is required when a community custody condition implicates First Amendment rights, such as a prohibition on possessing pornography, there is no corresponding First Amendment right to possess drug paraphernalia. Bahl, 164 Wn.2d at 757-58; see City of Tacoma v. Luvene, 118 Wn.2d 826, 842-44, 827 P.2d 1374 (1992) (city ordinance prohibiting soliciting, enticing, inducing, or procuring another to exchange, buy, sell, or use drug paraphernalia did not reach into arena of constitutionally protected First Amendment conduct).

In Motter, we reasoned that “[i]t is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances.” 139 Wn. App. at 804. Following Motter, we hold that the trial court is not required to list every drug paraphernalia item Sanchez and Sanchez Valencia are prohibited from possessing. The condition is sufficiently specific to notify Sanchez and Sanchez Valencia that they shall not use or possess drug paraphernalia. The fact that many legitimate items may be used to ingest or sell drugs does not make this condition unconstitutionally vague, because an item is not drug paraphernalia if possessed for its intended, lawful use. This is particularly true when the condition lists several common items that Sanchez and Sanchez Valencia are prohibited from possessing.

- State v. Sanchez and Sanchez Valencia, 148 Wn. App. at 320-322.

II. CONCLUSION

The State submits that this matter is not ripe for review. It does not implicate first amendment constitutional rights and as such there is a strong likelihood that it would require additional facts to determine whether or not there has been a violation of a condition.

DATED this 14 day of August, 2009.

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