

63439-9

63439-9

NO. 63439-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ASHENAFI TEFFERI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether several conditions of community custody imposed by the trial court should be stricken because they are not crime-related.

2. Whether a condition of community custody prohibiting the possession of pornography is vague and in need of clarification on remand.

3. Whether a condition of community custody authorizing a possible future substance abuse evaluation if ordered by the Department of Corrections should be upheld.

4. Whether the defendant's claims should be considered as claims of ineffective assistance of counsel.

B. STATEMENT OF THE CASE

The defendant, Ashenafi Tefferi, was charged with one count of rape in the second degree for an incident involving D.H., an adult female, which occurred in the early morning hours of February 2, 2007. CP 1-6. Tefferi's trial took place in February 2009 before the Honorable Michael Hayden. Tefferi waived his right to a jury trial, and so was tried to the bench. CP 34. The trial testimony established the following facts.

D.H., a woman in her twenties, and Christopher Gleason, a young man that D.H. was dating, went to a sports bar in the Greenlake neighborhood in the evening on February 1, 2007. RP (2/12/09) 41-42, 45. Gleason's friend Dan Wendfeldt met them at the sports bar. RP (2/17/09) 28. The three of them stayed at the bar until it closed at approximately 1:30 a.m. RP (2/12/09) 47.

Wendfeldt offered to give D.H. a ride home, but he soon realized that he had had too much to drink to be driving and allowed D.H. to drive his vehicle. Wendfeldt fell asleep in the passenger's seat, and when he awoke, he realized that D.H. had driven to a Shari's restaurant in Shoreline instead of to her home near the sports bar. RP (2/17/09) 33-34. Wendfeldt went inside the restaurant briefly, but then he told D.H. that he wasn't hungry and he wanted to go home, so he left. RP (2/17/09) 34. D.H. walked outside and decided to call a taxi. RP (2/12/09) 54-55.

While D.H. was outside calling the taxi company, she saw a Yellow Cab taxi parked nearby in a Safeway parking lot. RP (2/12/09) 56-57. There was a red sedan parked next to the taxi. RP (2/12/09) 58. D.H. approached Tefferi, the driver of the taxi, and asked him for a ride home. Tefferi told D.H. that his shift had ended, but he offered to give her a ride in the red car, which was

his personal vehicle. RP (2/12/09) 59. D.H. got into Tefferi's car and they drove away. RP (2/12/09) 60.

Tefferi drove to D.H.'s apartment near Greenlake and parked in the parking lot. RP (2/12/09) 64, 69. D.H. thanked Tefferi for the ride and turned to open the car door, but the door was locked. RP (2/12/09) 70. D.H. turned towards Tefferi to ask him to unlock the door. Tefferi then jumped on top of D.H. and started kissing her hard on the mouth. RP (2/12/09) 71-73.

Tefferi pinned D.H. down and tried to put his hand down her pants. D.H. resisted. Eventually, Tefferi succeeded in putting his hand down the front of D.H.'s pants and he briefly put one of his fingers inside her vagina. RP (2/12/09) 73-78. At that point, Tefferi sat up, unlocked the doors, and smiled at D.H. D.H. jumped out of the car and ran. RP (2/12/09) 80.

D.H. ran to her apartment door and got her keys out of her purse. As she was doing this, she could hear Tefferi running up behind her. RP (2/12/09) 81. D.H. had a mace canister on her keychain, and she turned around and aimed it at Tefferi so that he wouldn't come any closer. RP (2/12/09) 81-82. D.H. managed to get her door unlocked. She went inside, and slammed the door in Tefferi's face. RP (2/12/09) 84-86. She then looked out the

window and saw Tefferi get into his car and drive away.

RP (2/12/09) 87.

D.H. called the police the next day at the urging of a friend.

RP (2/12/09) 93-94. Detective Donna Stangeland was assigned to investigate the case. She took a statement from D.H. and noted that her lip had been injured as a result of the incident.

RP (2/12/09) 163-64.

Detective Stangeland contacted Tefferi at the Yellow Cab dispatch center on February 8, 2007 to ask him about what had happened. RP (2/12/09) 175. Tefferi initially denied that he had kissed or touched D.H., but he later stated that D.H. had kissed him rather than the other way around. Tefferi said that D.H. was very drunk and had called him "a magic man." RP (2/12/09) 188-89.

Tefferi explained that when a woman kisses a man, the man's hand "has an involuntary response, and it can go places on its own."

RP (2/12/09) 193. He then admitted that his hand may have gone down D.H.'s pants. RP (2/12/09) 194.

Tefferi testified at trial, and he claimed that D.H. was not the woman he had given a ride home to on February 2, 2007. He said that the woman who rode in his car was "short" and "fat." RP (2/17/09) 83-84. He claimed that this unknown woman "forced" him to give her a ride. RP (2/17/09) 85.

At the conclusion of the trial, the trial court found Tefferi guilty of rape in the second degree as charged. CP 37-41; RP (2/18/09) 43. The trial court imposed a minimum sentence at the bottom of the standard range, and imposed a maximum sentence of life as required. CP 47. In addition, with the agreement or acquiescence of both parties,¹ the trial court imposed all conditions of community custody that were proposed by the Department of Corrections (hereinafter "the DOC"). CP 51-52; RP (4/3/09) 6-7.

Tefferi now appeals. CP 61-72.

¹ Tefferi's trial counsel did not object to any of the proposed conditions of community custody for two reasons: 1) the likelihood that Tefferi would be deported upon his release from full confinement, thus rendering any conditions of community custody moot; and 2) the ability of a DOC-approved sexual deviancy treatment specialist to require Tefferi to abide by such conditions in any event. RP (4/3/09) 7.

C. ARGUMENT

**1. THE STATE AGREES THAT SEVERAL
CONDITIONS OF COMMUNITY CUSTODY
SHOULD BE STRICKEN BECAUSE THEY ARE
NOT CRIME-RELATED.**

Tefferi's only claims on appeal are related to the conditions of community custody that were imposed by the trial court. Specifically, Tefferi claims that the trial court exceeded its statutory authority in imposing conditions of community custody limiting or prohibiting his contact with minors, and prohibiting the possession or purchase of alcohol. The State agrees that these particular conditions should be stricken from Tefferi's judgment and sentence because they are not crime-related.

As Tefferi correctly notes, the controlling statute in this case is former RCW 9.94A.712(1)(a)(i), which provides for an indeterminate sentence to be followed by community custody. Under former RCW 9.94A.700(5)(e), the trial court may impose "crime-related prohibitions" as conditions of community custody. In this case, however, the trial court imposed prohibitions relating to contact with minors and purchasing or possessing alcohol that are not crime-related based on the evidence presented.

First, as to the conditions prohibiting or limiting contact with minors, these conditions clearly bear no relationship to the crime

Tefferi committed. As noted above, the victim of this crime, D.H., is an adult woman in her twenties. Accordingly, the conditions of community custody numbered 5 through 9 should be stricken from Appendix H of Tefferi's judgment and sentence. CP 51. See State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998) (holding that it is "not reasonable . . . to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime").

Second, as to the conditions of community custody prohibiting Tefferi from purchasing or possessing alcohol, the State agrees that these prohibitions are also not crime-related, as there is no evidence that Tefferi was using alcohol at the time of the offense. The sentencing court is expressly authorized to order the defendant not to *consume* alcohol. Former RCW 9.94A.700(5)(d). Moreover, the court may impose monitoring conditions, such as alcohol and drug testing, to assure the offender's compliance with its orders. See Riles, 135 Wn.2d at 342. However, a sentencing court's order prohibiting the purchase and possession of alcohol is not valid in the absence of evidence that alcohol use was related to the defendant's crimes. See State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Therefore, Tefferi is correct that the

trial court lacked the statutory authority to order these conditions in this case. As a result, condition number 15 on Appendix H of Tefferi's judgment and sentence should be modified to strike the words "purchase, possess or," while leaving the word "use" as written in accordance with the applicable statute. CP 51.

2. THE CONDITION PROHIBITING POSSESSION OF PORNOGRAPHY SHOULD BE CLARIFIED, NOT STRICKEN.

Tefferi also argues that condition number 10, prohibiting Tefferi from possessing or perusing "pornographic materials," is unconstitutionally vague and should be stricken. CP 51. The State agrees that controlling precedent holds that this condition of community custody is impermissibly vague. State v. Bahl, 164 Wn.2d 739, 752-58, 193 P.3d 678 (2008). Moreover, although a condition is valid when it delegates authority to a sexual deviancy treatment provider to decide what materials an offender is allowed to have while in treatment, the condition imposed in this case delegates such authority to a community corrections officer as well. This is not proper. State v. Sansone, 127 Wn. App. 630, 642-43, 111 P.3d 1251 (2005).

However, the proper remedy is not to strike the condition entirely as Tefferi contends. Rather, the remedy is to remand for the trial court to clarify the condition so that it contains the "necessary specificity." Sansone, 127 Wn. App. at 643.

3. THE CONDITION REGARDING A POSSIBLE SUBSTANCE ABUSE EVALUATION AND TREATMENT IS VALID BECAUSE IT MERELY AUTHORIZES POSSIBLE FUTURE ACTION BY THE DOC.

Although the State agrees that the conditions discussed in the previous argument sections should be stricken or modified, the State does not agree that condition number 13, which concerns a possible future substance abuse evaluation and the potential for treatment, should be stricken as well. To the contrary, this condition merely authorizes possible future action by the DOC that the DOC is already authorized to take.

Under the relevant statutory provisions applicable in this case, the DOC and the Indeterminate Sentencing Review Board (hereinafter "board") are authorized to impose conditions of community custody, including participation in rehabilitative programs, whether or not such conditions are crime-related. Accordingly, the condition of community custody Tefferi now

challenges is valid because it merely authorizes the DOC to take future action that it is already within its power to take. Accordingly, this condition should be affirmed.

As previously noted, in imposing conditions of community custody, the trial court must comply with former RCW 9.94A.700(4) and (5). Former RCW 9.94A.712(6)(a). In this respect, Tefferi is correct that any treatment or counseling services ordered directly by the trial court must be crime-related. See Brief of Appellant.

But the DOC and the board are granted the authority to impose additional conditions of community custody above and beyond those ordered directly by the trial court at sentencing. See former RCW 9.94A.713. Under this statute, the DOC is required to conduct a risk assessment and "recommend to the board any additional or modified conditions of the offender's community custody based upon the risk to community safety." Former RCW 9.94A.713(1). This provision specifically requires the DOC to recommend appropriate "rehabilitative programs" in which the offender may be required to participate or any other "affirmative conduct" the offender may be required to perform. Id. Although the DOC and the board may not impose conditions of community custody "that are contrary to those ordered by the court, and may

not contravene or decrease court-imposed conditions," the DOC and the board are clearly authorized to impose conditions *in addition to* those imposed by the court. Former RCW 9.94A.713(2); *see also* RCW 9.95.420(2).

In this case, Tefferi cites State v. Jones as controlling. In Jones, the court concluded that a sentencing court cannot require alcohol counseling as a condition of community custody unless the evidence shows that alcohol contributed to the offense. The court reached this conclusion in order to avoid rendering superfluous the requirement in former RCW 9.94A.700(5) that such counseling and treatment be "crime-related." Jones, 118 Wn. App. at 210.

However, Tefferi fails to recognize that additional conditions of community custody as may be deemed appropriate by the DOC and the board under former RCW 9.94A.713 need *not* be "crime-related." Rather, they need only be "based upon the risk to community safety." Former RCW 9.94A.713(1). Therefore, because the condition of community custody at issue here is contingent upon a finding by the sexual deviancy treatment provider or community corrections officer, and will only be implemented upon a risk assessment and recommendation to the board by the DOC, the trial court in this case has done no more than authorize

the DOC and the board to do what they already have authority to do by statute.² In short, because condition number 13 is contingent upon proper action by the DOC, Jones is not on point and Tefferi's claim regarding this condition should be rejected.

But finally, even if this Court finds that Tefferi's claim has merit, this Court should remand for entry of an order striking condition number 13 without prejudice to the DOC's authority to order an evaluation and treatment if it deems such action necessary to protect community safety if and when Tefferi becomes eligible for release from total confinement.

**4. TEFFERI'S CLAIMS OF INEFFECTIVE
ASSISTANCE OF COUNSEL SHOULD BE
REJECTED.**

Lastly, Tefferi argues in the alternative that all of these conditions of community custody should be stricken because he received ineffective assistance of counsel when his trial attorney did not object to these conditions. This argument should be rejected.

² In this respect, the community custody condition at issue here is arguably superfluous.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

In this case, Tefferi's trial counsel did not object to the conditions of community custody at issue for two reasons: 1) because Tefferi will likely be deported before any of these conditions go into effect; and 2) because even if Tefferi is eventually placed on community custody, the conditions at issue may be imposed by a future treatment provider in any event. RP (4/3/09) 7. In these circumstances, the failure to object to conditions that either will not be enforced or would be imposed during treatment anyway is not constitutionally deficient performance. In addition, given that none of these contested conditions has been enforced yet and the State has agreed that most of them should be stricken or modified, Tefferi cannot demonstrate prejudice, either.

D. CONCLUSION

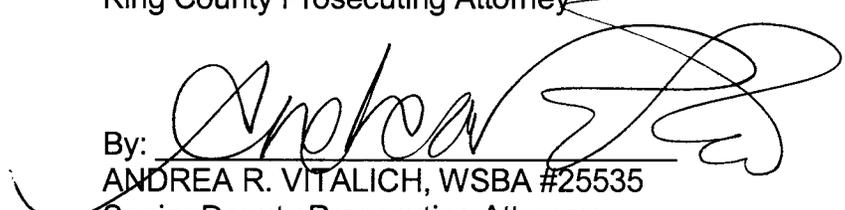
For the foregoing reasons, the State agrees that this Court should remand for entry of an order striking conditions of community custody relating to contact with minors and possession or purchase of alcohol. In addition, the condition prohibiting possession of pornography should be clarified on remand. The

condition related to the potential for a substance abuse evaluation
should be affirmed.

DATED this 27th day of January, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

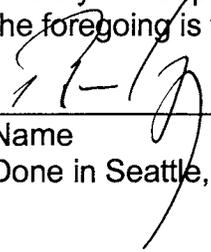
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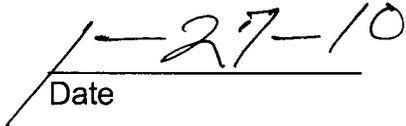
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ASHENAFI TEFFERI, Cause No. 63439-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date