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King County Prosecutor
Appellate Unit

NO. 66300-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISAIAS PERALTA-REYES,

Appellant.

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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court exceeded its authority in imposing conditions of community custody prohibiting possession or purchase of alcohol.

2. The court improperly delegated the definition of a condition of community custody to a treatment provider.

Issues Pertaining to Assignments of Error

1. Courts may impose only those sentences authorized by statute. The Sentencing Reform Act authorizes conditions of community custody to include prohibitions on consuming alcohol. It does not permit a ban on the mere possession of alcohol unless crime related. Where there was no evidence alcohol played any role in the offenses, is this condition of community custody void because unauthorized by statute?

2. Under the separation of powers doctrine, courts may not excessively delegate the authority to set conditions of community custody. Generally, delegation is improper if it does not provide sufficient guidance for the discretion to be exercised by another entity. Here, the court set as a condition of community custody that appellant not possess or peruse sexually explicit materials without prior approval of his treatment provider and delegated to the treatment provider the task of defining “sexually explicit materials.” Because it delegates away the power to define what is

prohibited, is this condition an unconstitutionally excessive delegation in violation of the separation of powers doctrine?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Isaias Peralta-Reyes with two counts of second-degree child molestation and one count of witness tampering. CP 5-6. After a bench trial at which Peralta represented himself, the court found Peralta guilty and imposed concurrent standard range sentences. CP 12-13, 20, 25. Peralta timely filed notice of appeal. CP 35.

2. Substantive Facts

In August 2009, Peralta lived with Eloyda Lopez, her 12-year-old daughter K.L., and the son the couple had in common. RP 420, 460. K.L. considered Peralta her stepfather. RP 424-25. The family attended the Four Square church in Federal Way. RP 483-84.

While both were helping out at a church event, K.L. told Silvia Guzman Peralta touched her on her breast. RP 426-27. She claimed it happened on the couch in the living room of their apartment while her mother was at work and her younger brother was also home. RP 427. She claimed she told Peralta to stop and threatened to tell her mother. RP 428. She claimed the contact continued for a minute or two, and then Peralta left.

RP 428. She testified this happened one other time, in addition to the day she told Guzman about it. RP 430.

Guzman reported K.L.'s allegations to K.L.'s mother and to church leaders. RP 449, 464. After talking to Guzman, K.L.'s mother told Peralta not to come back to her home. RP 465. Peralta began sleeping at the church. RP 497-98.

Church leaders decided to confront Peralta about the accusations. RP 492-94. Maria Arredondo, one of the pastors, testified that, when confronted, Peralta did not deny touching K.L., but instead said he didn't think there was anything wrong with what he did. RP 495. After first attempting to reconcile the family relationships, Arredondo ultimately called the police. RP 495-97. Police found Peralta asleep in his car in the church parking lot. RP 392.

After waking him up, they read him his rights and arrested him. RP 392. They first asked Peralta if he understood why they were there. RP 393. Peralta answered it was because he had been fighting a lot with K.L.'s mother. RP 393, 504-05. But the officer corrected him, saying actually it was because of K.L. RP 393. Peralta responded that whatever she said was true. RP 393. The officer told Peralta K.L. said he squeezed and touched her breast, and Peralta replied that if that's what she said then that's what happened. RP 507.

Back at the station, Peralta again repeated that whatever K.L. said must be true. RP 509. The officer told Peralta K.L. said he fondled and touched her breasts and asked whether that was true. RP 510. Peralta responded, "Yes." RP 590. When asked why, Peralta said he was trying to figure that out. RP 511. The officer then suggested that when a man touches a woman in that manner, it is usually for sexual reasons, and asked Peralta if that was why he touched K.L.'s breasts. RP 511. The officer claimed tears began to well up in Peralta's eyes before he agreed that was why he touched K.L. and apologized. RP 511. Peralta told the officer the touching had always been over the clothing. RP 511. Peralta could not say specifically how many times it happened, but admitted it happened more than once and stated that it happened however many times K.L. said it did. RP 395, 512.

In September 2010, K.L. wrote two letters denying Peralta ever touched her inappropriately and claiming her prior accusation was a lie. RP 433-34. At trial, she testified she wrote the letter first letter only because she wanted her brother to be able to have his father with him and the second one because her mother wanted her to. RP 433-34. She testified the letters were the lie, and Peralta actually did touch her breast on more than one occasion. RP 434-35.

While in jail, Peralta made several phone calls to K.L.'s mother. RP 468-70. The interpreter testified as to the contents of the calls. RP 593-600.

In the calls, Peralta is heard telling K.L.'s mother, "if you don't show up that's much better," and "if you have to come to trial, well I imagine that if you choose my side, it will be easier for me to get out." RP 598, 599-600. He is heard telling her, "Anyhow, you, you can actually tell the officer when he or she shows up, you know what, or tell your daughter, 'You know what, tell them that it was a lie.'" RP 600. Peralta testified he did not commit a crime and the evidence against him was falsified. RP 693.

C. ARGUMENT

1. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A CONDITION OF COMMUNITY CUSTODY PROHIBITING PERALTA FROM PURCHASING OR POSSESSING ALCOHOL.

Under RCW 9.94A.703, a sentencing court may require an offender to "Refrain from consuming alcohol." RCW 9.94A.703. However, it may not prohibit the mere possession or purchase of alcohol unless alcohol is somehow related to the crime. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). The condition of community custody prohibiting Peralta from purchasing or possessing alcohol should be stricken because it exceeds the sentencing court's statutory authority.

Whenever a sentencing court exceeds its statutory authority, its action is void. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). Sentencing courts may only impose sentences the Legislature has

authorized by statute. Id. Unauthorized conditions of a sentence may be challenged for the first time on appeal. Jones, 118 Wn. App. at 204; see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

Under RCW 9.94A.703, the sentencing court must impose certain conditions of community custody and may impose or waive certain others. Among the waivable conditions is a requirement that the offender “Refrain from consuming alcohol.” RCW 9.94A.703. The statute also permits other conditions of community custody if they are “crime related.” RCW 9.94A.703. In this case, the court went beyond what was authorized by statute and imposed a condition that prohibits Peralta from even purchasing or possessing alcohol despite the absence of any evidence alcohol played any role in his offense. CP 18.

The court has interpreted the prior version of RCW 9.94A.703 as permitting the court to impose a prohibition on consuming alcohol regardless of whether the crime involved alcohol.¹ Jones, 118 Wn. App. at 207; RCW 9.94A.703 (“As part of any term of community custody, the court may order an offender to: . . . Refrain from consuming alcohol.”). However, other

¹ Jones considered the Sentencing Reform Act as it existed in 2001. However, like the law in effect currently, the 2001 law permitted the court to impose a condition of community custody that the offender “shall not consume alcohol” without mention of possession or purchase. 118 Wn. App. at 206; RCW 9.94A.703.

alcohol related conditions, such as a requirement of treatment, are only authorized if they are crime related. Jones, 118 Wn. App. at 207-08.

Like the Jones court, this court should strike the condition of Peralta's community custody prohibiting him from possessing or purchasing alcohol. Id. at 212. Here, there is no indication alcohol played any role in the offenses at issue. Yet, under this condition, Peralta could be arrested based on legal use or possession of alcohol by a member of his household. He is not permitted even to host a party wherein some of the guests may imbibe. The court should reverse this general ban on possession or purchase of alcohol because it is unauthorized by statute. Jones, 118 Wn. App. at 212; Phelps, 113 Wn. App. at 354-55.

2. THE COURT IMPROPERLY DELEGATED ITS AUTHORITY TO DEFINE THE TERMS OF COMMUNITY CUSTODY TO A TREATMENT PROVIDER.

"[T]he precise delineation of the terms of probation is a core judicial function. The task cannot be delegated to a probation officer, treatment provider or other agency." State v. Williams, 97 Wn. App. 257, 264, 983 P.2d 687 (1999). Peralta asks this Court to vacate the condition of community custody requiring him to obtain prior approval before possessing or perusing sexually explicit materials because the court improperly delegated to the treatment provider the ability to define what constitutes

“sexually explicit materials.” CP 18. Additionally, this Court should remand to clarify whether the condition applies if Peralta is determined not to have a sexual deviancy and no treatment is required.

Excessive delegation of constitutionally allocated powers of government implicates the separation of powers doctrine. State v. Sansone, 127 Wn. App. 630, 641-42, 111 P.3d 1251 (2005). The separation of powers doctrine arises out of the tripartite system of three branches of government designed to provide checks and balances on each other’s power. State v. Blilie, 132 W.2d 484, 489, 939 P.2d 691 (1997); Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). The doctrine does not forbid all overlap or cooperation between the coequal branches of government. Carrick, 125 Wn.2d at 135. Instead, it forbids one branch from action that “threatens the independence or integrity or invades the prerogatives of another.” Id. (quoting Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). It also forbids excessive delegation of power amounting to a wholesale abdication of constitutional authority. Sansone, 127 Wn. App. at 642 (quoting United States v. Loy, 237 F.3d 251, 266 (3d Cir. 2001)).

Criminal sentencing is a “peculiarly shared” responsibility of all three branches of government. Mistretta v. United States, 488 U.S. 361, 109

S. Ct. 647, 102 L. Ed. 2d 714 (1989).² Fixing the punishment for crimes is a function of the legislative branch. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The judicial branch determines guilt and imposes the sentence provided by law. State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937). Additionally, some Legislative authority to set punishments has been delegated to the judicial branch via the Sentencing Reform Act. In re Pers. Restraint Petition of Brooks, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009). Sentencing courts may further delegate some aspects of community custody to the Department of Corrections or outside entities such as therapists. State v. Autrey, 136 Wn. App. 460, 468-69, 150 P.3d 580 (2006); Sansone, 127 Wn. App. at 642.

But the delegation in this case was unconstitutionally excessive. By requiring the treatment provider to define prohibited sexually explicit materials, the court delegated the very definition of what is prohibited under the condition. This amounts to a wholesale abdication of the court's authority to establish conditions of community custody. The result is that Peralta cannot discover what conduct is prohibited without potentially violating the condition. The condition is also problematic because there may be no treatment provider to define the terms.

² Although only our state constitution is implicated here, courts look to federal law principles on separation of powers to interpret and apply Washington's separation of powers principles. Blilie, 132 Wn.2d at 489.

Unlike statutes, conditions of community custody are not presumed constitutional. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). Imposition of sentencing conditions is discretionary, and unconstitutional conditions are an abuse of that discretion. Id. Whether a sentencing condition violates the constitution is a question of law, reviewed de novo. Autrey, 136 Wn. App. at 468-69.

- a. The Court Improperly Delegated Its Authority Because It Allowed the Treatment Provider Unfettered Discretion to Define the Meaning of the Condition.

Delegation issues are separate from but closely related to vagueness issues. Conner v. City of Seattle, 153 Wn. App. 673, 689 n.49, 223 P.3d 1201 (2009). While vagueness focuses on whether the legal standard provides fair notice to citizens and deters arbitrary enforcement, “The delegation issue focuses on whether the challenged law provides sufficient standards to guide administrative implementation.” Id. at 689 n.49 (citing Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 320 (2000)).

Delegation is excessive when a branch of government fails to provide “intelligible principles” to guide the discretion of the other branch or private party. Mistretta, 488 U.S. at 372; see also Conner, 153 Wn. App. at 689-90 (discussing A–S–P Assocs. v. City of Raleigh, 298 N.C. 207, 258

S.E.2d 444 (1979) (“So long as the conditions and characteristics of the historic district were sufficient to provide reasonable guidance to the commission, the standard was constitutionally sound.”). For example, in Mistretta, the United States Supreme Court considered the delegation of legislative power to the federal Sentencing Commission. 488 U.S. at 374. The court held the delegation was not excessive because Congress provided detailed goals and purposes for the Commission and prescribed seven factors for the Commission to consider in creating offense categories. Id. at 374-76.

In stark contrast to Mistretta is the court’s delegation of the definition of sexually explicit materials to a treatment provider in this case. The court provided no guidelines by which the treatment provider is to interpret this prohibition. CP 18. On the contrary, the conditions of community custody expressly delegate to the treatment provider the authority to define the term, presumably as he or she wishes. By delegating the very definition of the word, the court has provided no guidance whatsoever.

Although the Washington Supreme Court has declared the term “sexually explicit” is not unconstitutionally vague and ordinary persons can be expected to know what is prohibited, that is no longer true when the treatment provider is given unfettered discretion to define the word. Compare Bahl, 164 Wn.2d at 758-60. The result is something like Humpty Dumpty’s assertion that “When I use a word. . . it means just what I choose it

to mean – neither more nor less.” Lewis Carroll, Through the Looking Glass and What Alice Found There, in The Annotated Alice: The Definitive Edition 213 (Martin Gardner ed., Norton Publishers) (2000). Delegation creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating.” Sansone, 127 Wn. App. at 641 (quoting United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002)). The probation officer in Guagliardo, or the treatment provider here, “could well interpret the term more strictly than intended by the court.” Sansone, 127 Wn. App. at 641 (quoting United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002)).

There may indeed be an objective definition of sexually explicit materials that ordinary persons can be expected to understand. See Bahl, 164 Wn.2d at 758-60. But that is not the definition that applies. Under the terms of the condition, the only definition that matters is the one in the treatment provider’s head. The delegation creates an entirely subjective standard, precisely the danger the vagueness doctrine is meant to protect against. See Sansone, 127 Wn. App. at 642 (quoting Loy, 237 F.3d at 266).

By delegating definition of the core content of the condition to the treatment provider, the court took a non-vague use of plain English and rendered it inscrutable. Peralta cannot predict how his treatment provider would define sexually explicit, since the court gave no indication the power

to define would be limited to the dictionary definitions or common understanding of the words.

b. By Delegating the Definition of the Condition, the Court Has Abdicated Its Authority.

“[W]here the court makes the determination of whether a defendant must abide by a condition, . . . it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied.” United States v. Stephens, 424 F.3d 876, 880 (9th Cir. 2005). But the definition of the community custody conditions is not an administrative detail that may properly be delegated. Sansone, 127 Wn App. at 642. When the very meaning of the words is left to the discretion of an outside party, there has been a wholesale abdication of judicial responsibility to set the terms of release. See, e.g., Loy, 237 F.3d at 266. This excessive delegation violates the separation of powers doctrine. Sansone, 127 Wn. App. at 642.

The condition in Loy had no core meaning beyond “whatever is necessary for Loy’s rehabilitation.” Loy, 237 F.3d at 266. The court held it was improper to allow the probation officer unfettered freedom to define that core meaning. Loy, 237 F.3d at 266. The court concluded the condition was an excessive delegation, a wholesale abdication of judicial authority. Loy, 237 F.3d at 266.

Similarly here, the definition of sexually explicit materials, the core of the condition, is entirely subjective, to be defined by the treatment provider. The condition has no meaning beyond the treatment provider's subjective definition. Thus, there has been a wholesale abdication of the court's authority to impose the sentence. Loy, 237 F.3d at 266.

c. The Treatment Provider's Unfettered Discretion to Define Sexually Explicit Materials Places Peralta in an Impossible Predicament.

When Alice complained she did not know what Humpty Dumpty meant, he replied, "Of course you don't – till I tell you." Carroll, supra. Peralta is in precisely this predicament, identified by the court in Sansone. The court rejected the State's argument that Sansone could discover what constituted pornography by asking his CCO:

If Sansone was unsure as to whether certain materials constituted pornography, the condition contemplates that he would ask his probation officer. However, if in seeking this decision he brought the materials with him to show the officer and the materials were determined to be pornography, Sansone would then be in violation of the conditions of his community placement.

Sansone, 127 Wn. App. at 641. Essentially, Sansone could not determine the scope of the prohibition without potentially violating it.

Like Sansone, to determine whether something constitutes "sexually explicit materials," Peralta must bring it to his treatment provider for determination and risk being arrested for possessing it. He cannot rely on

the common understanding of the words because under the court's order, those do not govern. The only understanding that matters is that of his treatment provider.

The State may argue this case is analogous to Autrey, where the court upheld a condition requiring Autrey to obtain prior approval from his CCO or therapist before engaging in any sexual contact. 136 Wn. App. at 468. This argument should be rejected because the court in Autrey did not delegate the very power to define what constitutes sexual contact. Thus, Autrey could rely on the commonly understood meanings of words to determine what conduct he must avoid or obtain approval for. Peralta cannot.

d. The Delegation to a Treatment Provider Is Improper Because Peralta May Not Have a Treatment Provider.

The court concluded in Sansone that allowing a treatment provider to define prohibited pornography be permissible "if Sansone were in treatment." 127 Wn. App. at 643. But this exception does not save the condition at issue here. Peralta is not currently in treatment. He is ordered to have a sexual deviancy evaluation that evaluation may or may not lead to diagnosis and treatment. CP 17. The condition that he refrain from possessing or perusing sexually explicit materials is not expressly conditioned on his participation in treatment. CP 18.

The condition is analogous to the condition in Bahl that the defendant “not possess or control sexual stimulus material for your particular deviancy.” 164 Wn.2d at 761. The court found it instead unconstitutionally vague because Bahl had not yet been diagnosed with any deviancy. Id. Thus, the condition provided no notice as to what conduct would violate it. Id. Since Peralta may never have a treatment provider beyond the initial evaluation, there may be no one to provide the requisite definition or approval. At a minimum, this Court should remand to clarify whether the condition applies in the event Peralta is found not to require treatment.

e. This Unconstitutional Condition of Peralta’s Sentence Is Ripe and Is Properly 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.” Ford, 137 Wn.2d at 477. Constitutional challenges under the separation of powers doctrine may also be raised for the first time on appeal. See State v. Ramos, 149 Wn. App. 266, 270 n. 2, 202 P.3d 383 (2009) (discussing constitutionality of statute improperly delegating risk classification of sex offenders) (citing RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); State v. Aguirre, 73 Wn. App. 682, 687, 871 P.2d 616 (1994)). But see State v. Smith, 130 Wn. App. 721, 729-30, 123 P.3d 896 (2005).

In Smith, this Court concluded that even if there was excessive delegation of authority, that error did not affect any substantive constitutional right. 130 Wn. App. at 729. But the court's holding is based in part on the lack of a sufficient record to determine on appeal whether the delegation was appropriate or not. The court noted, "On the present record it is not clear whether or not the specific prohibition was in writing; who generated it, and when; and what involvement the court had, if any. The brevity of the record leaves a great deal to the imagination." Id. at 728.

By contrast, the record in this case contains the documentation and facts necessary to determine this claim on appeal. The terms of the condition are in writing in the Judgment and Sentence, which is part of the record on appeal. CP 18. Thus, unlike in Smith, this Court can determine who generated the condition and when and the extent of the sentencing court's involvement. Because the concerns at issue in Smith are non-existent here, this court should follow Division Two's holding in Ramos and the more general principle that an erroneous sentence may be challenged for the first time on appeal.

Additionally, the Bahl court's holding permitting pre-enforcement vagueness challenges to conditions of community custody applies equally to the excessive delegation challenge in this case. See Bahl, 164 Wn.2d at 751. In State v. Valencia, 169 Wn.2d 782, 787-88, 239 P.3d 1059 (2010), the

court reiterated and further explained the ripeness rule from Bahl. A pre-enforcement challenge to a community custody condition is ripe when “the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” Valencia, 169 Wn.2d at 786 (quoting Bahl, 164 Wn.2d at 751). The question of excessive delegation is a legal one, and nothing about the scope of the court’s delegation will change between now and Peralta’s eventual release. There is no indication Peralta’s judgment and sentence is anything other than final.

This challenge to undue delegation of Peralta’s condition of community custody is properly brought both pre-enforcement and for the first time on appeal. Valencia, 169 Wn.2d at 786; Ford, 137 Wn.2d at 477; Ramos, 149 Wn. App. at 270 n. 2. Therefore, this Court should reject any potential arguments based on preservation of error or ripeness.

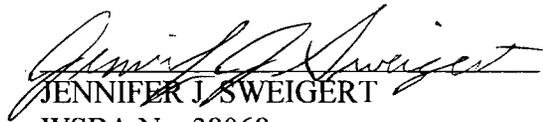
D. CONCLUSION

For the foregoing reasons, this Court should strike the conditions of community custody prohibiting Peralta from purchasing or possessing alcohol and from possessing or perusing sexually explicit materials as defined by his treatment provider.

DATED this 7th day of June, 2011.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66300-3-1
)	
ISAIAS PERALTA-REYES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JULY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISAIAS PERALTA-REYES
DOC NO. 343694
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JULY 2011.

x Patrick Mayovsky

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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