

No. 67218-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WILLIAM MONGE,

Appellant.

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

The Honorable Richard D. Eadie
The Honorable Steven Gonzales

BRIEF OF APPELLANT

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STATE OF WASHINGTON
2011 DEC -5 PM 4:58
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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

THE ALCOHOL PROHIBITION CONDITION IN THE
JUDGMENT AND SENTENCE WAS NOT CRIME
RELATED AND MUST BE STRICKEN 2

1. Courts are authorized to impose prohibitions that are
“crime-related” as part of the sentence. 2

2. The challenged condition was not related to the offense for
which Mr. Monge was convicted. 3

3. The appropriate remedy is to strike the offending
condition. 6

F. CONCLUSION 6

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Betts, 511 F.3d 872 (9th Cir.2007)..... 5

WASHINGTON CASES

State v. Acrey, 135 Wn.App. 938, 146 P.3d 1215 (2006)..... 4

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007)..... 3

State v. Jones, 118 Wn.App. 199, 76 P.3d 258 (2003) 3, 6

State v. Julian, 102 Wn.App. 296, 9 P.3d 851 (2000) 3

State v. Motter, 139 Wn.App. 797, 162 P.3d 1190 (2007), *review denied*, 163 Wn.2d 1025 (2008) 4

State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007)..... 2

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) 3

State v. Zimmer, 146 Wn.App. 405, 190 P.3d 121 (2008)..... 4

STATUTES

RCW 9.94A.030 3

RCW 9.94A.650 2

RCW 9.94A.703 2

A. ASSIGNMENT OF ERROR

The court's imposition of the condition of sentence barring Mr. Monge from consuming any alcohol exceeded the trial court's authority as it was not crime related.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In imposing a felony sentence, a trial court has the authority to impose only those conditions that are related to the offense for which the defendant was convicted. Is this Court required to strike the condition of sentence barring Mr. Monge from consuming any alcohol as this condition was not related to the offense for which he was convicted?

C. STATEMENT OF THE CASE

Joseph Monge was charged with second degree robbery for taking controlled substances from a pharmacy while threatening to "blow [the clerk's] head off". CP 1, 3-4. As part of a plea agreement, Mr. Monge pleaded guilty to the offense of attempted second degree robbery. CP 7-8. In his Statement of Defendant on Plea of Guilty, Mr. Monge agreed "that substance abuse contributed to [the] crime." CP 12.

At sentencing, the court sentenced Mr. Monge to a First Time Offender Waiver and imposed several conditions as part of community custody, including the following:

The defendant shall not consume any alcohol.

...
The defendant shall participate in the following crime-related treatment or counseling services:
Substance abuse evaluation and follow all treatment recommendations.

CP 36.

D. ARGUMENT

THE ALCOHOL PROHIBITION CONDITION IN THE JUDGMENT AND SENTENCE WAS NOT CRIME RELATED AND MUST BE STRICKEN

1. Courts are authorized to impose prohibitions that are "crime-related" as part of the sentence. Only the legislature may establish potential legal punishments. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Because Mr. Monge was sentenced under the First Time Offender Waiver, the sentencing court was required to impose a term of community custody and the conditions specified in RCW 9.94A.703. RCW 9.94A.650(3), (4). The court also had discretion to order Mr. Monge "to comply with any crime-related prohibitions" and to bar consumption of alcohol. RCW 9.94A.703(3)(e). A crime-related prohibition is "an order of a

court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted . . .” RCW 9.94A.030(10). Such conditions are usually upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Whether the court imposed the conditions with the requisite statutory authority is a question of law that this Court reviews *de novo*. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Although Mr. Monge did not challenge the condition at sentencing, crime relationship sentencing challenges can be raised for the first time on appeal. *State v. Julian*, 102 Wn.App. 296, 304, 9 P.3d 851 (2000) (“A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.”). See also *State v. Jones*, 118 Wn.App. 199, 204, 76 P.3d 258 (2003) (defendants can object to community custody conditions for the first time on appeal).

2. The challenged condition was not related to the offense for which Mr. Monge was convicted. Although under RCW 9.94A.030(10), no causal link need be established between the prohibition imposed and the crime committed, the condition must

still relate to the circumstances of the crime. *State v. Acrey*, 135 Wn.App. 938, 946, 146 P.3d 1215 (2006).

For instance, in *State v. Zimmer*, it was determined that a prohibition on possession of a cellular telephone and an “electronic data storage device,” was not a crime related prohibition because there was no evidence in the record indicating that the defendant used such devices in committing the crime. 146 Wn.App. 405, 413-14, 190 P.3d 121 (2008).

Here the challenged condition barring Mr. Monge from consuming alcohol was not crime-related, or even related to the circumstances of the attempted robbery. There was no evidence in the record, either by way of Mr. Monge's admission or in the Certification for Determination of Probable Cause to which Mr. Monge stipulated could be used by the court for sentencing, that the robbery was fueled or influenced in any way by alcohol. Certainly, barring a defendant from possessing drug paraphernalia, where the conviction was related to drugs or substance abuse, “is a ‘crime-related prohibition[]’ authorized under RCW 9.94A.700(5)(e).” *Cf. State v. Motter*, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007), *review denied*, 163 Wn.2d 1025 (2008). But that was not the case here. Mr. Monge agreed only that substance

abuse contributed to the offense and the court imposed treatment for substance abuse as a condition of the sentence. CP 12, 36.

Without relating the condition to Mr. Monge, the trial court deprived him of one of the basic liberties:

Moderate consumption of alcohol does not rise to the dignity of our sacred liberties, such as freedom of speech, but the freedom to drink a beer while sitting in a recliner and watching a football game is nevertheless a liberty people have, and it is probably exercised by more people than the liberty to publish a political opinion. Liberties can be taken away during supervised release to deter crime, protect the public, and provide correctional treatment, but that is not why it was taken away in this case.

United States v. Betts, 511 F.3d 872, 880 (9th Cir.2007). In *Betts*, the district court imposed a similar ban on alcohol use during the defendant's supervised release despite there being no evidence that alcohol use contributed to the charged offense. 511 F.3d at 877-78. The Ninth Circuit struck the offending condition:

No one suggests that alcohol played any role in Betts's crime. And there was no evidence that Betts had any past problems with alcohol. Under these circumstances, we think it impossible to say that the condition imposed bears a reasonable relationship to rehabilitating the offender, protecting the public, or providing adequate deterrence.

Id., at 878.

Likewise, there was no evidence presented here that this event was precipitated or caused by the use of alcohol. Thus, this condition does not relate to the crime and must be stricken.

3. The appropriate remedy is to strike the offending condition. Where the trial court exceeds its authority in imposing an invalid condition of sentence, the remedy is to strike the offending condition or conditions. See *Jones*, 118 Wn.App. at 212 (“On remand, the trial court shall strike the condition pertaining to alcohol counseling.”). This Court should strike the challenged condition as being unrelated to the crimes for which Mr. Monge was convicted.

F. CONCLUSION

For the reasons stated, Mr. Monge requests this Court strike the offending condition of his sentence.

DATED this 5th day of December 2011.

Respectfully submitted,



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JOSEPH MONGE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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