

NO. 67218-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WILLIAM MONGE,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JAN 24 PM 2:58

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE  
THE HONORABLE STEVEN GONZÁLES

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ERIN H. BECKER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	3
D. <u>CONCLUSION</u> .....	9

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Betts, 511 F.3d 872  
(9<sup>th</sup> Cir. 2007) ..... 8

Washington State:

State v. Acevedo, 159 Wn. App. 221,  
248 P.3d 526 (2010)..... 6, 7

State v. Acrey, 135 Wn. App. 938,  
146 P.3d 1215 (2006)..... 4, 7

State v. Armendariz, 160 Wn.2d 106,  
156 P.3d 201 (2007)..... 5, 7

State v. Hale, 94 Wn. App. 46,  
971 P.2d 88 (1999)..... 4

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

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

State v. Warren, 165 Wn.2d 17,  
195 P.3d 940 (2008)..... 6, 7

Statutes

Washington State:

RCW 9.94A.030 ..... 1  
RCW 9.94A.505 ..... 7, 8  
RCW 9.94A.650 ..... 1, 4  
RCW 9.94A.703 ..... 4, 5, 7, 8, 9

Other Authorities

Sentencing Reform Act ..... 4, 7, 8

**A. ISSUES PRESENTED**

A sentencing court may impose a requirement that a defendant refrain from consuming alcohol as a condition of community custody. The authorizing statute does not require, as it does for other conditions, that the prohibition on consuming alcohol be crime-related. Did the sentencing court act within its authority when it sentenced Monge to community custody and ordered that he not consume alcohol?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On January 27, 2011, the State charged the defendant, Joseph Monge, with one count of Robbery in the Second Degree. CP 1. Pursuant to plea negotiations, the State amended the Information to one count of Attempted Robbery in the Second Degree,<sup>1</sup> CP 7, and the defendant entered a plea of guilty to the amended charge. CP 8-18. At sentencing, the State

---

<sup>1</sup> Unlike Robbery in the Second Degree, Attempted Robbery in the Second Degree is eligible for imposition of a First Time Offender Waiver. RCW 9.94A.650(1)(a) (precluding imposition of a First Time Offender Waiver for "violent offenses"); RCW 9.94A.030(54)(a) (defining "violent offense" as including Robbery in the Second Degree, but not including Attempted Robbery in the Second Degree).

recommended that the court impose a First Time Offender Waiver, and impose numerous conditions on the defendant, including 24 months of community custody, a substance abuse evaluation and followup treatment, and a prohibition on the consumption of alcohol. CP 27; 2 RP 1-2.<sup>2</sup> The court followed the State's recommendation, and imposed a First Time Offender Waiver with 24 months of community custody. CP 31. Among the conditions of supervision imposed was a requirement that the defendant abstain from consuming alcohol. CP 36. This appeal timely followed. CP 37-38.

## **2. SUBSTANTIVE FACTS**

On January 20, 2011, Monge robbed the Safeway pharmacy located at 516 First Avenue West in Seattle, Washington. Monge, a prescription pill addict, had filled his methadone prescriptions at that Safeway pharmacy for years, until his pattern of "doctor shopping" was discovered and Safeway refused to continue to fill the methadone prescriptions. On January 20, he went to the

---

<sup>2</sup> This brief will use the designation 1 RP to refer to the Transcript of Proceedings dated March 31, 2011 (Monge's entry of a plea of guilty), and 2 RP to refer to the Transcript of Proceedings dated May 9, 2011 (the sentencing hearing).

pharmacy and handed the pharmacist a note, which read, “Nicole, Give me all Methadone and Alprazolam! I’m not fucking kidding. I’ll blow your head off then mine! You can thank Dr. Abraham for this! Now move it!” The pharmacist, Nicole Kaczmarek complied, giving Monge both methadone and alprazolam. Monge then fled the pharmacy with the stolen drugs. CP 3-5, 17-18.

**C. ARGUMENT**

Monge complains that the court exceeded its authority in imposing a condition that he refrain from consuming alcohol, because the legislature has not authorized such a condition of community custody absent a finding that alcohol use contributed to the commission of the offense. Monge is wrong. The legislature explicitly authorized the prohibition of alcohol consumption as a condition of community custody without regard to whether alcohol use contributed to the crime. The sentencing court should be affirmed.

It is up to the legislature, not the courts, to authorize punishments of various crimes. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007) (“This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative

function.” (citations and internal quotation marks omitted)). A trial court only possesses the power to impose sentences provided by law. State v. Acrey, 135 Wn. App. 938, 942, 146 P.3d 1215 (2006) (citation omitted). When a court exceeds its sentencing authority, as granted by the legislature, it commits reversible error. E.g., State v. Hale, 94 Wn. App. 46, 53-54, 971 P.2d 88 (1999).

Here, Monge does not contest that the sentencing court legally imposed a First Time Offender Waiver sentence and community custody. RCW 9.94A.650, .703. When a sentencing court imposes community custody, the Washington Legislature has explicitly authorized that court to prohibit a defendant from consuming alcohol. Specifically, the Sentencing Reform Act provides:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

...

**(3) Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

- (a) Remain within, or outside of, a specified geographical boundary;
- (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) Participate in crime-related treatment or counseling services;

- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) Refrain from consuming alcohol; or
- (f) Comply with any crime-related prohibitions.

RCW 9.94A.703 (emphasis added).

Despite Monge's claim to the contrary, the statutory language does not require that a court-imposed prohibition on alcohol be crime-related. Instead, the language unambiguously permits a court to prohibit consumption of alcohol regardless of whether the offense was related to alcohol. The lack of ambiguity in the statute is even more obvious when read in conjunction with the rest of the statute, which explicitly requires certain other conditions to be "crime-related." Where statutory language is unambiguous, this court's construction of a statute is at an end and the plain meaning of the statute is to be enforced. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Indeed, reading the statute to mean that the prohibition of alcohol consumption must be crime-related would render that subsection superfluous in light of the very next clause authorizing the sentencing court to impose "any crime-related prohibition[]." RCW 9.94A.703(3)(f) (emphasis added). Accordingly, the legislature has

authorized a sentencing court to ban the consumption of alcohol as a condition of community custody without regard to whether alcohol contributed to the offense.

Interestingly, in a case cited by Monge for an entirely different proposition, Division II has already addressed the exact question raised by this appeal, and clearly held that a trial court could prohibit a defendant's consumption of alcohol "regardless of whether alcohol had contributed to the offense." State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) ("[W]e hold that the trial court had authority to order Jones not to consume alcohol, despite the lack of evidence that alcohol had contributed to his offenses."); see also State v. Acevedo, 159 Wn. App. 221, 233, 248 P.3d 526 (2010).

Rather than bringing to this Court's attention the case that is directly on point, Monge instead cites to other cases in support of his argument that a no-alcohol condition must be crime-related. However, none of these cases is applicable here. First, Monge cites to State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), in support of his claim that sentencing conditions will be upheld "if reasonably crime related." Petitioner's Brief, at 3 (emphasis added). However, the Warren court examined the legality of

imposing conditions of sentence independent of community custody. Warren, 165 Wn.2d at 32. The State agrees that, when conditions of sentence are imposed pursuant to RCW 9.94A.505(8) and outside the context of community custody, the conditions must be crime-related.<sup>3</sup> Here, however, the sentencing court prohibited Monge from consuming alcohol as a condition of community custody, CP 36, which is governed by RCW 9.94A.703, quoted above, instead of RCW 9.94A.505.<sup>4</sup>

Similarly, Monge points to Acrey, 135 Wn. App. 938, to support his claim that a “condition must relate to the circumstances of the crime.” Petitioner’s Brief, at 3-4. As with Warren, however, Acrey examined the imposition of a crime-related prohibition in the context of RCW 9.94A.505(8), not RCW 9.94A.703. Id. at 942-43. Again, the sentencing court’s requirement that Monge not consume alcohol was a condition of community custody, governed by RCW

---

<sup>3</sup> RCW 9.94A.505(8) provides: “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.”

<sup>4</sup> See Armendariz, 160 Wn.2d at 112-17, and Acevedo, 159 Wn. App. 221, for a discussion of how RCW 9.94A.505(8) imbues a sentencing court with authority to impose crime-related prohibitions independent of any other SRA provision, such as RCW 9.94A.703.

9.94A.703, CP 36, not a generic condition of sentence, governed by RCW 9.94A.505(8).

Finally, Monge cites United States v. Betts, 511 F.3d 872 (9<sup>th</sup> Cir. 2007); his purpose in doing so is unclear. The federal statutory scheme provides no guidance as to how Washington's SRA should be interpreted or applied. Monge's passing reference to "basic liberties" cannot possibly be interpreted as a claim that RCW 9.94A.703(3)(e) is an unconstitutional deprivation of liberty without due process; even if it is, the argument is insufficiently developed for either the respondent or this Court to seriously consider. Finally, to the extent the reference is made solely in support of Monge's argument that the sentencing court's prohibition on his consumption of alcohol was not crime-related, the State makes no argument that Monge's alcohol use contributed to the commission of the instant offense.

Instead, the statutory scheme promulgated by the legislature permits a sentencing court to prohibit a defendant from consuming alcohol--regardless of whether alcohol use or abuse contributed to the commission of the crime--as long as the prohibition is a condition of community custody. The sentencing court here

exercised the explicit authority granted to it by RCW 9.94A.703. In so doing, it did not err. Monge's sentence should be affirmed.

**D. CONCLUSION**

The legislature has explicitly authorized sentencing courts to impose a requirement that defendants sentenced to community custody not consume alcohol. The sentencing court here exercised that authority. It did not err. The sentencing court should be affirmed.

DATED this 23<sup>rd</sup> day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

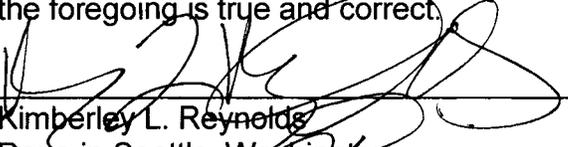
By: 

ERIN H. BECKER, WSBA #28289  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Notice of Appearance and Brief of Respondent, in STATE V. JOSEPH WILLIAM MONGE, Cause No. 67218-5-1, 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.

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

1/24/12  
Date