

69267-4

69267-4

NO. 69267-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN BROWN,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Lucas, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court imposed a lifetime term of community custody for which it had no statutory authority.

2. The trial court erroneously imposed a sentencing condition that unjustifiably restricted contact with the appellant's biological child.

3. The trial court exceeded its statutory sentencing authority by including a prohibition on alcohol possession among other conditions of community custody.

Issues Pertaining to Assignments of Error

1. Did the trial court exceed its statutory sentencing authority by imposing a term of community custody for life as part of a sentence for a sex offender who was less than 17 years old at the time of the crime?

2. Must the sentencing condition prohibiting unsupervised contact with all minor children be amended to allow contact with the appellant's biological son because the global prohibition was not reasonably necessary to protect the appellant's own child from harm?

3. Did the trial court exceed its statutory sentencing authority by including a prohibition on alcohol possession among other community custody conditions because alcohol played no role in the commission of

the underlying crime or the violations of the suspended sentence and because the appellant will turn 21 years old during his prison term?

B. STATEMENT OF THE CASE

The State charged Jonathan R. Brown with first degree child molestation. CP 95-96. Brown stipulated to a bench trial on agreed evidence. CP 41-92. The evidence included a transcript of a taped interview in which the 6-year-old complainant told a police officer Brown touched her private with his finger when she was 5 years old. CP 58-60, 62-67. Brown admitted he committed the offense in exchange for the opportunity to request a Special Sex Offender Sentencing Alternative (SSOSA). CP 92. He was 18 years old at the time of the stipulation. CP 75.

The trial court found Brown guilty. CP 39-40; 1RP 3-4.¹ The court imposed a standard range, minimum 68-month prison term and a maximum term of life. The court suspended the sentence and imposed a SSOSA. The court also ordered Brown to community custody for life. CP 24-38; 1RP 12. Among a host of sentencing conditions were prohibitions on the use of unprescribed controlled substances and contact with minors

¹ 1RP is the verbatim report of the May 2, 2012 proceeding. 2RP is the verbatim report of the August 24, 2012 proceeding.

other than his own son, and requirements that he notify his community corrections officer (CCO) of any address or employment change and that he comply with sex offender registration rules. CP 33-36.

Three months later, the State filed a petition to modify or revoke the SSOSA, along with two violation notices. CP 15-23. The CCO alleged Brown consumed unprescribed oxycodone, failed to report an address change, failed to properly register as a sex offender at the new address, and had contact with a minor child. CP 17-23.

At the violation hearing, Brown stipulated to the oxycodone and child contact violations. 2RP 3-4. The CCO testified via telephone that Brown suggested moving to a new address in Chehalis where his uncle lived. 2RP 7-8. The CCO told Brown he could not move until the home was checked and approved as a suitable place to stay. 2RP 8. Brown represented that no minors lived at the Chehalis location. 2RP 8.

The CCO went to the suggested address and spoke with resident Dave Wangen.² Wangen said Brown had asked him to falsely say he was an uncle, and disclosed Brown was a friend of his 15-year-old son. 2RP 8,

² The CCO refers to Mr. "Wangen" in her Notice of Violation. CP 18. The court reporter spelled the name "Wagan." 2RP 8. Because it is more likely the CCO used the correct spelling in the violation notice, "Wangen" is used here.

13. Wangen told the CCO that Brown had moved into his residence about a week earlier. 2RP 8. Brown's counsel did not object to the CCO's hearsay testimony.

The CCO confronted Brown with Wangen's information. Brown admitted he had been staying with Wangen for about five days. 2RP 9. Brown did not report the address change to the officer. 2RP 9. Nor did he register as a sex offender at the new address, which he was required to do within three business days. 2RP 9-10.

The trial court found the evidence sufficient to prove Brown willfully committed the violations. 2RP 21. The court revoked the SSOSA and imposed the original 68-month minimum term and lifetime community custody. 2RP 23.

Brown, who had not testified, then requested he be permitted to tell the court "the real truth about the four violations." 2RP 24. The court warned Brown that what he said would be recorded and could be used against him. 2RP 24. Brown chose to make a statement. He explained he temporarily stayed at a camper on Wangen's property because he was starving at his registered residence. He always came back, however, after two days and did not violate registration requirements. 2RP 24-26. He took the oxycodone because he had injured his back by lifting a heavy

object. 2RP 26. He had contact with Wangen's son, but only because the son "ended up showing up" during one of his stays. 2RP 26.

Brown pleaded with the court to give him another chance with the SSOSA, which he hoped to get transferred to Missouri so he could be with his son. 2RP 27-28. The trial court found Brown was "just not believable" and refused to change its decision. 2RP 28-29.

C. ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY ORDERED COMMUNITY CUSTODY FOR LIFE BECAUSE BROWN WAS LESS THAN 17 YEARS OLD AT THE TIME OF THE OFFENSE.

The trial court ordered Brown both in the original sentence and in the revocation order to serve a term of community custody for the length of the maximum term of the sentence. CP 12 (revocation order); CP 27 (judgment and sentence, section 4.1(d)). The maximum sentence for first degree child molestation, a class A felony categorized as a "sex offense," is life. RCW 9A.20.021(1)(a); RCW 9A.44.083(2); Former RCW 9.94A.030(42)(a)(i) (2008). But because Brown was less than 17 years old when the crime occurred, he did not qualify for a community custody term of life. Former RCW 9.94A.712(2) (2008). The sentence is thus legally erroneous.

The trial court sentenced Brown to "community custody under the charge of [the Department of Corrections (DOC)] for the length of the suspended sentence, the length of the maximum term sentenced under RCW 9.94A.507, or three years, whichever is greater." CP 27 (section 4.1(d)). The revocation order provides for a term of community custody "for any period of time that the defendant is released from total confinement before expiration of the statutory maximum." CP 12.

The authority for this length of community custody is RCW 9.94A.507(5), which provides:

When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

There are two problems with the court's application of this statute to Brown. First, it did not take effect until August 1, 2009, which is well after the end of the charging period of January 24, 2009. CP 95-96. Second, RCW 9.94A.507(2) specifically exempts offenders who were "seventeen years of age or younger at the time of the offense[.]" Brown's date of birth is April 26, 1993. CP 2. Therefore, Brown was 14 or 15

during the January 1, 2008 to January 24, 2009 charging period. RCW 9.94A.507 thus did not apply to Brown.

The predecessor to RCW 9.94A.507, which temporally applied to Brown, was former RCW 9.94A.712 (2008). That version, however, also exempted offenders who were 17 or younger at the time of the crime. RCW 9.94A.712(2). Therefore, RCW 9.94A.712, titled "Sentencing of nonpersistent offenders," does not apply to Brown.

The statute that does apply to Brown is former RCW 9.94A.715(1) (2008). It provided:

When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712 . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer.

Former RCW 9.94A.850 (2008) did not establish specific community custody ranges. It instead directed the Sentencing Guidelines Commission to establish the initial ranges and to recommend any desired modifications yearly. Former RCW 9.94A.850(5)(a) (2008).

However, in the "Administrative Code References" section of the provision is a citation to "WAC 737-06-010 et. seq." WAC 737-20-010, titled "Community Custody Ranges," established the ranges for felony

offenses (attached as appendix). The community custody range for sex offenses, of which first degree child molestation is one, was 36 months to 48 months.³

Finally, former RCW 9.94A.728 (2008) addresses earned early release. For an offender convicted of a class A felony sex offense, such as Brown, "the aggregate earned release time may not exceed ten percent of the sentence." RCW 9.94A.728(1). Under RCW 9.94A.728(2)(b), a person convicted of a sex offense may become eligible "for transfer to community custody status in lieu of earned release time pursuant to subsection (1) of this section[.]"

Therefore, Brown could be sentenced to however much of the 68-month standard range sentence gets "forgiven" under earned early release time. In any event, the trial court applied the wrong law to Brown because he was younger than age 17 during the charging period. This legal sentencing error may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). Reversal of Brown's lifetime community custody term is warranted, as is a remand for imposition of a 36-month to 48-month range of community custody.

³ Effective July 26, 2009, the Legislature established determinate terms for community custody rather than ranges. Laws 2009 ch. 375, § 5.

2. THE TRIAL COURT VIOLATED BROWN'S
FUNDAMENTAL RIGHT TO THE CARE AND
CUSTODY OF HIS CHILD WHEN IT IMPOSED A
SENTENCING CONDITION THAT UNJUSTIFIABLY
RESTRICTED CONTACT WITH HIS CHILD.

Brown has a son who was born early in 2012. 1RP 16. When the court originally imposed the SSOSA, it allowed Brown to have supervised contact with his son. CP 36 (condition 10a); 1RP 16. After the court revoked supervision, it imposed a standard range sentence, which included community custody for life. CP 11-12. The court entered inconsistent orders regarding contact with his son. In two places on the revocation order, the court ordered Brown have no contact with minors. CP 12-13. But the court also re-imposed the original sentencing conditions, one of which was the allowance of supervised contact with his son. CP 13. Because prohibition of all contact with Brown's son until he reached the age of majority would violate a fundamental right to parent, this Court should remand with an order to permit supervised contact.

A trial court may impose and enforce crime-related prohibitions. RCW 9.94A.505(8) (general sentencing); former RCW 9.94A.700(5)(e) (2008) (community custody). 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[.]" Former RCW

9.94A.030(13) (2008). Crime-related prohibitions may include orders prohibiting contact with specified individuals for the statutory maximum term. Former RCW 9.94A.700(5)(b) (2008); State v. Armendariz, 160 Wn.2d 106, 116, 156 P.3d 201 (2007).

The imposition of crime-related prohibitions is reviewed for abuse of discretion. State v. Letourneau, 100 Wn. App. 424, 431, 997 P.2d 436 (2000). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). The range of discretionary options is a legal question and the judge abuses his or her discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Community custody conditions may be challenged for the first time on appeal. See, e.g., State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or incorrect sentence may be attacked for the first time on appeal); State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (various challenges to sentencing conditions reviewable despite failure to

object in trial court); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (sentence imposed without statutory authority can be challenged for first time on appeal), review denied, 143 Wn.2d 1003 (2001).

Parents have a fundamental right to the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001); Letourneau, 100 Wn. App. at 438. State interference with a fundamental right is subject to strict scrutiny. In re Parentage of C.A.M.A., 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005). Strict scrutiny requires that the infringement be narrowly tailored to serve a compelling state interest. C.A.M.A., 154 Wn.2d at 61.

Prevention of harm to children is a compelling state interest, but crime-related prohibitions that limit fundamental rights are valid only if they are "reasonably necessary to accomplish the essential needs of the state." Ancira, 107 Wn. App. at 653-54 (quoting State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), where court concluded prohibition on convicted sex offender's contact with minors was unjustified because victim was not a minor). To withstand constitutional scrutiny, no-contact orders relating to biological children must be reasonably necessary to protect them from harm. Letourneau, 100 Wn. App. at 439.

In Brown's case, there is no evidence he harmed his biological son. Nor is there evidence he molested any minor other than H. N. There is no evidence he has a generalized sexual interest in pre-teen children. No expert witness opined Brown is a pedophile. Brown's offense was victim-specific. Finally, the results of Brown's polygraph test corroborated his claim he molested only the complainant. Supp. CP __ (sub. no. 42, Presentence Investigation Report, Sexual Deviancy Evaluation at pp. 7, 9, filed 5/3/2012). The prohibition on all contact with Brown's biological child is, therefore, not reasonably necessary to protect the child from being molested. The prohibition is therefore invalid.

Letourneau is instructive. In that case, the defendant, a schoolteacher, was convicted of raping a 13-year-old student. Letourneau, 100 Wn. App. at 428-29. The sentencing court imposed a condition prohibiting the defendant from unsupervised contact with her biological minor children. 100 Wn. App. at 430. One expert opined the defendant posed a danger to her biological children and observed "[m]any sex offenders have offended a victim other than their biological child and later offend their own child of the same or opposite sex." Letourneau, 100 Wn. App. at 440.

This Court regarded the expert's opinion as insufficient to justify the no-contact order. Letourneau, 100 Wn. App. at 441-42. It held, "The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights." Letourneau, 100 Wn. App. at 442.

This Court held the no-contact condition was not reasonably necessary to prevent the defendant from sexually molesting her own children, where there was no "affirmative showing" that she was a pedophile or otherwise posed a danger of molesting her children. Letourneau, 100 Wn. App. at 442. See Ancira, 107 Wn. App. at 654 (striking no-contact provision because evidence did not show restriction was reasonably necessary to prevent child's exposure to domestic violence).

As in Letourneau, Brown's offense was committed against a child other than his own. The State failed to show the no-contact provision was reasonably necessary to protect Brown's son. The condition should therefore be amended to allow contact between Brown and his child. Letourneau, 100 Wn. App. at 427.

3. THE SENTENCING COURT ACTED OUTSIDE ITS AUTHORITY IN PROHIBITING ALCOHOL POSSESSION FOR LIFE.

A trial court must impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. Bahl, 164 Wn.2d at 744; Julian, 102 Wn. App. at 304. An offender has standing to challenge conditions even though he has not been charged with violating them. See Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

The trial court imposed its original sentence for first degree child molestation, which the Sentencing Reform Act (SRA) categorizes as a sex offense. Former RCW 9.94A.030 (42)(a)(i) (2008). At the time Brown committed his crime, sex offenders under age 17 at the time of the crime were sentenced according to former RCW 9.94A.715 (2008). That statute authorized a trial court to impose a term of community custody. Former RCW 9.94A.715 (1) (2008). Here the court imposed a community custody term for life.

Under former RCW 9.94A.715(2)(a), unless the court waived a condition, the conditions of community custody shall include those set

forth in former RCW 9.94A.700(4), and may include those provided for in former RCW 9.94A.700(5). In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community” Former RCW 9.94A.715(2)(a) (2008).

Former RCW 9.94A.700 (5) (2008) provided:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

Brown's revocation order includes a prohibition on *possession* of alcohol. CP 13. Because this condition is not included in former RCW 9.94A.700(5), the trial court had no authority to impose it unless it reasonably related to the circumstances of the offense. Former RCW 9.94A.715 (2)(a). Under Jones, it does not.

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, Jones' counsel explained Jones was bipolar, off of his medications, and using methamphetamine at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes. The sentencing court nevertheless included a community custody condition requiring participation in alcohol counseling. Jones, 118 Wn. App. at 202-03.

The appellate court first observed former RCW 9.94A.700(5)(c) authorized a trial court to order an offender to "participate in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The court held because the evidence failed to show alcohol contributed to Jones' offenses or the trial court's alcohol counseling condition was "crime-related," the trial court erred by ordering Jones to participate in counseling. Jones, 118 Wn. App. at 207-08.

The court also recognized, however, that former RCW 9.94A.715 (2)(b) permitted a trial court to order an offender to "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[.]” Jones, 118 Wn. App. at 208. This condition also applies to Brown.

The court held the provision must be harmonized with former RCW 9.94A.700 (5)(c), "so that no part of either statute is rendered superfluous" 118 Wn. App. at 208. To give meaning to the requirement that counseling be related to the crime, the Court held, alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense. Id.

The same language analyzed in Jones applies to Brown's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence alcohol contributed to Brown's offense. The community custody condition prohibiting possession of alcohol is not related to the circumstances of Brown's offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana). This court should order the condition stricken.

Brown, however, is not yet 21 years old, so he cannot lawfully possess alcohol. He was born on April 26, 1993. CP 37. This Court should therefore remand for amendment of the condition to indicate the prohibition on possession of alcohol is ineffective after April 26, 2014, when Brown turns 21.

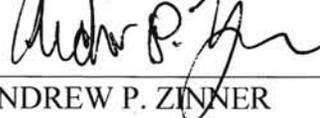
D. CONCLUSION

For the above reasons, this Court should remand Brown's judgment and sentence with an order directing the trial court to amend the community custody term, permit contact between Brown and his biological son and allow possession of alcohol once Brown becomes 21 years old.

DATED this 27 day of February, 2013.

Respectfully submitted,

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APPENDIX

Washington Administrative Code ^{Currentness}
Title 437. Sentencing Guidelines Commission
Chapter 437-20. Community Custody Ranges

WAC 437-20-010

437-20-010. Community custody ranges.*

community custody ranges

| Offense Type | Community Custody Range |
|--|--------------------------------|
| Sex Offenses (Not sentenced under RCW 9.94A.120(8)) | 36 to 48 months |
| Serious Violent Offenses | 24 to 48 months |
| Violent Offenses | 18 to 36 months |
| Crimes Against Persons (As defined in RCW 9.94A.440(2)) | 9 to 18 months |
| Offenses under chapter 69.50 or 69.52 RCW (Not sentenced under RCW 9.94A.120(6)) | 9 to 12 months |

The ranges specified in this section are not intended to affect or limit the authority to impose exceptional community custody ranges, either above or below the standard community custody range as authorized by RCW 9.94A.120(2) and pursuant to guidelines specified in RCW 9.94A.390. The community custody range for offenders with multiple convictions must be based on the offense that dictates the longest term of community custody. The community custody range for offenders convicted of an offense that falls into more than one of the five categories of offense types listed in this section must be based on the offense type that dictates the longest term of community custody.

*This section has been superseded by section 5, chapter 235, Laws of 2009. Community custody ranges have been changed to a fixed period of time with other conditions. Please refer to RCW 9.94A.701.

Credits

Statutory Authority: RCW 9.94A.850 and chapter 34.05 RCW. 09-21-108, S 437-20-010, filed 10/21/09, effective 11/21/09.
Statutory Authority: RCW 9.94A.040(6) (rule-making authority under chapter 34.05 RCW). 00-11-052, S 437-20-010, filed 5/12/00, effective 7/1/00.

Current with amendments adopted through the 13-1 Washington State Register dated, January 2, 2013.

WAC 437-20-010, WA ADC 437-20-010

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

STATE OF WASHINGTON)

Respondent,)

vs.)

JONATHAN BROWN,)

Appellant.)

COA NO. 69267-4-1

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 27TH DAY OF FEBRUARY, 2013, 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 AND/OR EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY, 2013.

x *Patrick Mayovsky*

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