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NO. 69347-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB WARNER,

Appellant.

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

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory sentencing authority by imposing certain alcohol-related sentencing conditions. CP 25

2. The community custody condition prohibiting possession of "drug paraphernalia" violates due process because it is unconstitutionally vague. CP 25.

Issue Pertaining To Assignments Of Error

1. Did the trial court exceed its statutory sentencing authority by imposing certain alcohol-related community custody conditions where there was no evidence alcohol use played any factor in the commission of the crimes, and where the conditions were not statutorily authorized?

2. Is the community custody condition prohibiting possession of "drug paraphernalia" unconstitutionally vague because they does not provide fair warning of proscribed conduct and expose appellant to arbitrary enforcement?

B. STATEMENT OF THE CASE

The State charged Jacob Warner by amended information with first degree assault and first degree robbery. CP 45-46. It was alleged Warner was armed with deadly weapon in the commission of the two offenses. Id. Warner pleaded guilty. CP 29-44; RP 6 (July 30, 2012).

The court sentenced Warner to 147 months on the assault and 54 months on the robbery. CP 16-28. In addition, the court imposed 36 months of community custody. CP 20. The conditions of community custody included (1) "[d]o not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale" and (2) "[d] o not possess drug paraphernalia." CP 25 (Appendix 4.2).

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY.

As conditions of community custody, the trial court ordered Warner not to "possess or consume alcohol" or to "frequent establishments where alcohol is the chief commodity for sale." CP 25. The prohibitions on alcohol possession and frequenting bars and liquor stores are unauthorized because they are neither crime-related nor specifically authorized by law.

A sentencing court is authorized by statute to require an offender to [r]efrain from consuming alcohol. RCW 9.94A.703(3)(e). However, it may not prohibit the mere possession of alcohol unless alcohol is related to the crime. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

There is no evidence that alcohol played any part in the crimes. Indeed, in the Presentence Investigation, Warner told the investigator he had not consumed any alcohol in the previous three years. CP 12.

Whether a trial court has the statutory authority to impose a sentencing condition is a matter of statutory interpretation and the standard of review is de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). 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 impose only 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.

RCW 9.94A.703 lists mandatory and waivable conditions of community custody. Among the waivable conditions is a requirement that the offender [r]efrain from consuming alcohol. RCW 9.94A.703(3)(e). The statute also permits "any crime-related prohibitions." RCW 9.94A.703(3)(f). 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. Jones, 118 Wn. App. at 207; former RCW 9.94A.700(5). However, other alcohol-related conditions, such as treatment, are authorized only if related to the offense. Jones, 118 Wn. App. at 207-08.

Although the court had the statutory authority to prohibit Warner from consuming alcohol as a community custody condition, because there is no evidence whatsoever that alcohol was connected to the crimes it lacked the authority to prohibit Warner from possessing alcohol. The same applies to that part of the condition prohibiting Warner from "frequent[ing] establishments where alcohol is the chief commodity for sale." CP 25. Because alcohol was not related to commission of the offenses, the court exceeded its statutory sentencing authority by imposing these prohibitions. The Court should order those conditions be stricken.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM POSSESSING DRUG PARAPHERNALIA IS UNCONSTITUTIONALLY VAGUE

A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. State v. Sanchez Valencia, 169 Wn.2d 782, 785, 787, 239 P.3d 1059 (2010). The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution require the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270

(1993). A prohibition is void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn. 2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

As a condition of community custody, the court ordered, "[d]o not possess drug paraphernalia." CP 25. This condition violates due process because it is not sufficiently definite to apprise Warner of prohibited conduct, and does not prevent arbitrary enforcement.

In Sanchez Valencia, the Supreme Court struck down the following similar condition as unconstitutionally vague: "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices." Sanchez Valencia, 169 Wn.2d at 785, 794-95. The Court concluded the provision violated both prongs of the vagueness test: it failed to provide fair notice and failed to prevent arbitrary enforcement. Id. at 794-95.

In Sanchez Valencia, the Court reasoned "'an inventive probation officer could envision any common place item as possible for use as drug

paraphernalia,' such as sandwich bags or paper. Supp'l Br. of Appellant at 10. Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Sanchez Valencia, 169 Wn.2d at 794-95. As in Sanchez Valencia, and for the same reasons, the similar condition here also failed to provide fair notice, and the breadth of potential violations does not protect against arbitrary enforcement.

Moreover, the condition is written in terms of strict liability. There is no mens rea attached to the condition prohibiting possession of drug paraphernalia. CP 25; see Sanchez Valencia, 169 Wn.2d at 794 ("The Court of Appeals also erroneously read into the condition an intent element. Intent is not part of the condition as written.").

The condition prohibiting Warner from possessing drug paraphernalia is unconstitutionally vague. The condition should also be stricken from the judgment and sentence.

D. CONCLUSION

Warner requests the challenged community custody conditions be stricken from the judgment and sentence.

DATED this 19 day of February, 2013

Respectfully Submitted,

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Respondent,	)	
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v.	)	COA NO. 69347-6-I
	)	
JACOB WARNER,	)	
	)	
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 20TH 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 VIA EMAIL

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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF FEBRUARY 2013.

x Patrick Mayovsky