NO. 44674-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES LYNN BERNARDE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 03-1-02212-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court abused its discretion in revoking defendant's SSOSA when defendant stipulated to three violations of his suspended sentence and the court found three additional violations by a preponderance of the evidence?

2. Should this case be remanded to correct defendant's judgment and sentence where his original sentence exceeded the statutory maximum?

3. Has defendant failed to show that the trial court abused its discretion in imposing community custody conditions requiring defendant to submit to plethysmograph testing and prohibiting defendant from possessing pornographic materials when they were proper crime related prohibitions?

4. Did the trial court exceed its statutory authority in part when it imposed condition 13 on defendant's community custody and limited medications to those only prescribed by a licensed physician?

B. STATEMENT OF THE CASE.

On May 12, 2003, the Pierce County Prosecuting Attorney (State), charged James Bernarde (defendant), with seven counts of child molestation in the second degree. CP 1-4, 5-8. The victims were defendant's minor daughters. CP 5-8. On October 10, 2003, defendant pleaded guilty to all counts. CP 9-13. In exchange for his guilty plea, the State recommended—and the trial court subsequently imposed— a Special Sex Offender Sentencing Alternative (SSOSA). CP 9-13, 40-54.

The court imposed a high-end, standard-range sentence of 116 months on each count all to run concurrent. CP 45. The court suspended all but 180 days of the sentence for four years. CP 45. As part of the four years of community custody, the court ordered defendant undergo sex offender treatment for three years, or until successful completion. CP 46.

The court also required defendant to follow all rules set forth by his treatment provider, including submitting to periodic polygraph and plethysmograph testing, not having any contact with minors, not possessing pornographic materials, and not consuming any mind or mood altering substances without a valid prescription from a licensed physician. CP 53, 58.

Defendant subsequently entered a sex offender treatment program at Comte's & Associates. In June of 2004, defendant's treatment provider, Jeanglee Strickland, wrote in her quarterly evaluation report that defendant was having difficulty "grasping the concept of 'no contact with minors,'"

and described two separate occasions in which defendant had had contact with children. CP Supp. 348-50. Ms. Strickland also noted that defendant needed to work on controlling his impulses and practicing relapse prevention strategies. CP Supp. 348-50.

In August of 2007, Ms. Strickland sent a letter to defendant's Community Corrections Officer (CCO) and informed her that, while Ms. Strickland had previously thought defendant had made adequate progress and recommended he be discharged from treatment, a recent polygraph examination found that defendant had been deceptive and he had failed the polygraph test. CP Supp. 351. In light of these recent events, Ms. Strickland informed the CCO that she no longer recommended he be released from treatment. CP Supp. 351.

In October of 2007, Ms. Strickland sent another report to defendant's CCO informing her that defendant had been arrested for a domestic violence incident for hitting his wife in the face. CP Supp. 352-56. When defendant was later asked about some inconsistencies in his statements about the incident by the treatment group, defendant became hostile. CP Supp. 352-56; RP(10/26/07) 5.[1] It was later discovered that defendant had called some of his group members and attempted to persuade them to lie to the treatment provider on his behalf. RP(10/26/07)

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[1] The State will refer to the verbatim report of proceedings by the date of the proceedings followed by the page number.

5; CP Supp. 352-56. In that same report, Ms. Strickland also reported that defendant submitted to a plethysmograph test and was aroused by minors engaged in sexual intercourse. CP Supp. 355. Ms. Strickland reported that defendant "is back to where he was the day he entered treatment" and that his "display offensiveness and denial when confronted with his recent behaviors is most disturbing." CP Supp. 355.

As a result of defendant's behavior, the State asked the court to revoke defendant's SSOSA during the October 26, 2007, review hearing. RP(10/26/07) 6. The court denied the State's request because that proceeding was not set up as a revocation proceeding. RP (10/26/07) 12. However, the court noted that "it is appropriate to keep [defendant] on a very short leash" and imposed review hearings every two months going forward. RP(10/26/07) 12-13.

On July 10, 2009, defendant's treatment provider wrote a report releasing defendant from sex offender treatment as a successful graduate of the program. CP 171-73. That same day, the court terminated the SSOSA treatment and set a review hearing for February 12, 2010. RP(07/10/09) 4. The court entered an order titled "ORDER CONTINUING SSOSA TREATMENT" but the term "CONTINUING" was crossed out and the word "TERMINATING" was written over it. CP 169-70. However, the order provided that "the requirement of treatment in this cause is continued." CP 169.

During the February 12, 2010, hearing the parties discussed the inconsistencies in the last order. Judge Arend stated that her notes did not reflect that treatment was terminated and that, due to defendant's prior problems with accepting responsibility, she would "err on the side of caution for the protection of the public and set another review hearing." RP(2/12/10) 7.

An order was filed that same day that stated that defendant had completed his SSOSA required treatment, and that aftercare treatment was recommended but not required. CP 180. The State declared at that time that if defendant chose not to engage in aftercare treatment, the State would seek revocation for any violation. RP(2/12/10) 8.

In May of 2012, defendant's CCO filed a violation report. CP 195-204. In the report, defendant's CCO stated that defendant had revealed that during the course of his work he had come into contact with, and handled, approximately eighteen firearms. CP 197. Defendant disclosed that he had traveled to King County without permission, and that he had contact with minors in the course of his work.[2] CP 197. Defendant also told his CCO that he had shaken hands with a ten year old child at church. CP 199. The CCO determined that the contact with the minor at church constituted a violation of a condition of his sentence. CP 199. As a result, the CCO

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[2] Defendant is employed as a contract electrician. RP(3/22/13) 76.

directed defendant back to sex offender treatment. CP 201.

In July 19, 2012, the State petitioned the court for a review hearing after the State learned that defendant had altered a polygraph examination by holding his breath. CP 205-08; RP(7/27/12) 2-3. At the hearing, defendant's CCO stated that defendant had regressed and recommended that defendant continue sex offender treatment. RP(7/27/12) 8. The court ordered defendant undergo another polygraph and increased his reporting to the Department of Corrections to once a week. RP(7/27/12) 6, 8-9.

On August 1, 2012, the State filed a petition to revoke defendant's SSOSA, as defendant had failed to "obey all laws" by driving a vehicle without having insurance. CP 213-14. The court placed defendant on a no-bail hold pending the future hearing. RP(8/1/12) 9.

On August 3, 2012, the court sentenced defendant to 30 days in jail for the violation of driving without insurance. RP(8/1/12) 9. The court stated that the rest of the violations would be addressed at a future hearing. RP(8/1/12) 9.

On September 28, 2012, the court entered an amended order that stated that defendant can only have incidental contact with minors with permission by his CCO, and only limited to church and at his work site. RP(9/28/12) 6-7. At that hearing, defendant's CCO asked that the court order defendant to "continue with treatment until successfully discharged

by his treatment provider," and further noted that defendant "is having some difficulties as a former graduate from [sex offender] treatment." RP(9/28/12) 9. The court agreed, and ordered defendant continue sex offender treatment. RP(9/28/12) 10-11.

On October 23, 2012, defendant spoke to his CCO and informed her that he was glad the court had changed his reporting instructions and that he was now able to take more jobs in residential homes where children were present. RP(11/09/12) 5. Sally Saxon, defendant's CCO, had informed defendant prior that there were no changes to his reporting instructions and that he was to have no contact, direct or indirect, with minors. RP(11/09/12) 4. When Saxon further questioned defendant about his statements regarding the supposed changes in reporting, defendant denied having contact with minors, but stated that he was under the impression that he was allowed to work in homes with minors present. RP(11/09/12) 5-6. Saxon then reviewed defendant's most recent polygraph report, where defendant had stated that he had in fact began to have incidental contact with minors by going into their homes for work related purposes. RP(11/09/12) 6. Defendant was subsequently arrested for the violation of unreported and unauthorized contact with minors. RP(11/09/12) 3-4.

On November 9, 2012, defendant's treatment provider issued a report stating that defendant had "regressed to the defensive and intolerant man that he was in the past, unlike the man we saw near the end of his treatment in 2009." CP 248. The report further stated that defendant "has not demonstrated the expected judgment, decision-making or behaviors we would expect from a successful sex offender treatment graduate. He's been deceptive and secretive..." CP 248. The court found a violation occurred, sentenced defendant to 30 days confinement, and stated that it was "very concerned" with defendant's recent behavior. RP(11/09/12) 29, 34. The court also stated that it "insist[ed] upon exact and complete compliance with the CCO" following defendant's release. RP(11/09/12) 29.

On January 30, 2013, Tacoma Police Officers responded to a domestic violence call at defendant's residence. RP(3/22/13) 11-12. Defendant's wife's son had called the police after he heard a commotion coming from his mother's bedroom and walked in to see her holding her stomach, crying, and exclaiming "he hit me, he hit me," while defendant was in the room. RP(3/22/13) 54. Police arrived and spoke to defendant and his wife. Defendant's wife told police that she and defendant were arguing when defendant shoved a table into her stomach. RP(3/22/3) 25-26. Police subsequently placed defendant under arrest. RP(3/22/13) 28.

Defendant was released from custody the following day, Thursday, at approximately 5:00 p.m. RP(3/22/13) 68-69. A no-contact order was issued prohibiting defendant from returning to the home he shared with his wife. RP(3/22/13) 69. Per Department of Corrections, defendant was required to notify his CCO within 24 hours of being released from prison and changing his address. RP(3/22/13) 69. When Saxon had not heard from defendant by the following Monday, she attempted to contact him. RP(3/22/13) 70. Saxon called defendant's residence, and discovered he had been living in a hotel since his release from jail. RP(3/22/13) 70. Saxon was finally able to contact defendant at approximately 1:30 p.m. that afternoon. RP(3/22/13) 71. She found out from defendant that he had just registered with the Pierce County Sheriff's Office at approximately 12:45 p.m. and had returned to work, with no intention of reporting to the DOC until Saxon had directed him to. RP(3/22/13) 71.

In February of 2013, defendant's wife's son contacted Saxon and informed her that defendant had had contact with defendant's wife in violation of the no-contact order. CP 290-91. Saxon was informed that defendant had contacted his wife the day after being released from custody when he went to their residence to pick up some personal items, and again several days later when he gave her a ride home after she had been dropped off at his hotel by her granddaughter. CP 290-91.

A few weeks later, defendant was terminated from sex offender treatment. CP 302-303. Defendant's treatment provider stated that defendant's recent behavior was "inconceivable," and that his "blatant violation...leads me to believe he places himself above the rules set forth by the Court and DOC." CP 302-303. The treatment provider concluded that defendant was "no longer amendable to treatment in the community," and as such he was terminated from treatment. CP 302-303.

In March of 2013, defendant underwent a polygraph where he was asked 1) if he had contact with minors; 2) if he had contact with his wife in violation of the non-contact order; and 3) if he had left the county unauthorized. RP(3/22/13) 72. The polygraph indicated that defendant failed the question regarding contact with minors and was inconclusive on the other two questions due to changes in breathing. RP(3/22/13) 72.

Defendant subsequently disclosed that when he initially went to check into the hotel he was staying at after his release, he encountered a family with children in the lobby. RP(3/22/13) 73. Defendant made no effort to excuse himself at that point, nor did he report this interaction to the DOC. RP(3/22/13) 73.

Defendant disclosed a second incident where he had contact with minors at his work site. RP(3/22/13) 73. Defendant stated that he was at a job site at a residential home talking to two women when the children that

lived in that home returned from school and walked directly next to defendant and into the house. RP(3/22/13) 73. Defendant stated that he continued the conversation for another five to ten minutes before he left the premises. RP(3/22/13) 73. Saxon stated this conduct was a "direct contradiction to the direction I had provided to him multiple times in the past; that he was not to accept any jobs at any homes where minors resided whether they were home or not...." RP(3/22/13) 73. Saxon continued on to say that defendant's failure to report these incidents to his treatment providers and DOC was problematic, given that defendant had been instructed multiple times that he needed to do so. RP(3/22/13) 74.

On March 25, 2013, the court revoked defendant's SSOSA. RP(3/25/13) 184. The court found six violations: 1) failure to report change of address to DOC within 24 hours of move; 2) failure to obey all laws by violating an active no-contact order; 3) being terminated from court ordered sex offender treatment; 4) failure to obey all laws by physically assaulting Viola Bernarde; 5) failure to report to the DOC within 24 hours of release from custody; and 6) unreported and unauthorized contact with minors between March 1st an March 15, 2013. CP 282; 342-44; RP(3/25/13) 184. Defendant stipulated to the first three violations. CP 342-44. The court found that "the State has gone far beyond a preponderance of the evidence in this case and...revocation is the only

appropriate remedy." RP(3/25/13) 184. On March 27, 2013, defendant filed a timely notice of appeal. CP 345.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REVOKING DEFENDANT'S SSOSA AFTER DEFENDANT STIPULATED TO THREE VIOLATIONS AND THE COURT FOUND THREE ADDITIONAL VIOLATIONS BY A PREPONDERANCE OF THE EVIDENCE.

A superior court may revoke an offender's SSOSA suspended sentence at any time if it is reasonably satisfied that the offender violated a condition of his suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(11); ***State v. Dahl***, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). Because a revocation of a suspended sentence is not a criminal proceeding, the due process rights afforded at a revocation hearing are not the same as those afforded at trial. ***Dahl***, 139 Wn.2d at 683. Such minimal due process rights entail: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses; (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. *Id.* Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed

absent an abuse of discretion. ***State v. McCormick***, 166 Wn.2d 689, 213 P.3d 32 (2009). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. ***State v. Partee***, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

In the present case, defendant had completed treatment but was ordered back to sex offender treatment by the court at the advice of his CCO after he had regressed back to his previous ways. RP(7/27/12) 8; RP(9/28/12) 10-11. Defendant's treatment provider noted that defendant had become "complacent with following his probation rules." CP 302. She further noted that defendant "believes he places himself above the rules" and is "no longer amenable to treatment in the community." CP 303. As a result, he was terminated from sex offender treatment. CP 303. The court subsequently revoked defendant's SSOSA, finding his termination a violation. CP 282; 342-44; RP(3/25/13) 184.

Defendant argues that the trial court abused its discretion in revoking his SSOSA and finding that he was terminated from treatment because defendant had "successfully completed" sex offender treatment in the past. Brief of appellant at 16-17. Defendant's claim fails, because his behavior and attitude after completing treatment was not consistent with that of a successful graduate. In a report issued November of 2012—nearly three years after defendant "successfully completed" sex offender treatment—his treatment provider wrote "[defendant has] been deceptive and secretive to get his needs met and placing his needs before those of

others, a strict violation of an offender's code to honor the community's 'need to know' and an obligation to serve as a sex offender to be transparent in his relationships with others." CP 247-49.

Moreover, defendant stipulated to violations which resulted in the court's ruling terminating the SSOSA. CP 343; RP(3/25/13) 169. In the order revoking sentence—which defendant signed— stated that:

> The court found three violations occurred *based upon the defendant's stipulation to* and waiver of his right to confront applicable witnesses as to the following:
>
> 1) The defendant failed to report his change of address to DOC within 24 hours of his move on January 31, 2013;
>
> 2) The defendant failed to obey all laws by contacting Viola Bernarde in violation of Tacoma Municipal Court's no contact order D45192 on February 3, 2013; and
>
> 3) *The defendant was terminated from court ordered sex offender treatment with Jeanglee Tracer on February 17, 2013.*

CP 343 (emphasis added).

Because defendant's termination from sex offender treatment was a violation of his suspended sentence, the trial court did not abuse its discretion in revoking defendant's SSOSA based in part on this violation.

2. AN ORDER SHOULD BE ENTERED TO AMEND THE TERMS OF CONFINEMENT TO COMPLY WITH RCW 9.94A.701(9).

On July 23, 2009, the Washington Supreme Court held that, because the exact amount of time that a defendant will spend in

confinement can almost never be determined at sentencing, a defendant's judgment and sentence must "explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum."[3] ***In re Personal Restraint of Brooks***, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). However, the court noted in dicta that its ruling in ***Brooks*** would likely be superseded by amendments of the 2009 regular session of the State Legislature. *Id.* at 672 n. 4.

Effective July 26, 2009, the Washington State legislature passed what is now codified as RCW 9.94A.701(9). It provides that the community custody term specified by RCW 9.94A.701[4] "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." Laws of 2009, ch. 375, § 5; former RCW 9.94A.701(8).

In ***State v. Franklin***, 172 Wn.2d 831, 839, 263 P.3d 585 (2011), the Washington Supreme Court addressed the new sentencing requirements and concluded that RCW 9.94A.701(9) applies retroactively and that the Department of Corrections (DOC), not the trial court, is responsible for bringing pre-amendment sentences into compliance with the new statute. *Id.* at 839–840.

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[3] This became known as a "Brooks Notation."
[4] RCW 9.94A.701 is titled, "Community Custody Offenders sentenced to the custody of the department."

In ***State v. Boyd***, the Washington Supreme Court held that the trial court, not the DOC, is responsible for bringing post-amendment sentences into compliance with RCW 9.94A.701(9). 174 Wn.2d 470, 471, 275 P.3d 321 (2012). The court also reiterated its position in ***Franklin***, that "following the enactment of [RCW 9.94A.701], the "'*Brooks* notation' procedure no longer complies with statutory requirements." ***Boyd***, 174 Wn.2d at 471.

Here, the statutory maximum term for a class B felony is 120 months. CP 343; RCW 9A.44.086. As the court sentenced defendant to 116 months in custody, the maximum term of community custody allowed is four months.

In the order revoking the SSOSA, the Court included the following "Brooks notation":

> The Defendant is additionally sentenced to a term of community custody for that period of time that equals the difference between 120 months and the period of time spent in total confinement less credit time served and good time; see Appendix F attached hereto and incorporated by reference.

CP 343. However, such notation is no longer sufficient to establish that a sentence complies with statutory requirements. ***Boyd***, 174 Wn.2d at 471.

Because defendant was convicted of a Class B felony and was sentenced to a combination of confinement and community custody that exceeds the statutory maximum of ten years after July 26, 2009, the court must enter an order to correct the terms of confinement to comply with

RCW 9.94A.701(9) per ***Boyd***.

This case should be remanded for the trial court to correct defendant's community custody.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING COMMUNITY CUSTODY CONDITIONS REQUIRING DEFENDANT UNDERGO PLETHYSMOGRAPH TESTING AND PROHIBITING DEFENDANT FROM POSSESSING PORNOGRAPHY WHEN THEY WERE PROPER CRIME RELATED PROHIBITIONS.

The law provides broad discretion to the trial court to impose conditions on community custody:

> 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 given 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.

A sentencing court may only impose statutorily authorized sentences. ***State v. Paulson***, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). When the trial court imposes an unauthorized condition on community custody, the reviewing court remedies the error by striking the unauthorized condition. *See* ***State v. O'Cain***, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

> In imposing a sentence, a sentencing court may:
> ...rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proven in a trial or a the time of sentencing, or proven pursuant to RCW 9.94A.573. Acknowledgement includes not objecting to information stated in the pre-sentence reports and not objecting to criminal history at the time of sentencing.

9.94A.530(2).

When the sentencing court has statutory authority to impose a sentencing condition, the appellate court reviews sentencing conditions for an abuse of discretion. ***State v. Riley***, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A sentencing court abuses its discretion when the sentence is manifestly unreasonable or based on untenable reasons, such that no reasonable person would adopt the view of the court. *Id.* Although a crime related prohibition must be directly related to the crime, it does need to be casually related to the crime. ***State v. Autrey***, 136 Wn. App. 460, 467, 150

P.3d 580 (2006). A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct." RCW 9.94A.030.

a. The trial court did not abuse its discretion in mandating defendant undergo plethysmograph testing because it is a crime related treatment.

The trial court imposed condition 19 upon defendant, which stated that he must:

> Submit to polygraph and plethysmograph testing upon direction of your community corrections officer or therapist at your expense.

CP 58.

Plethysmograph testing is a valid condition when ordered incident to crime-related treatment. ***State v. Castro***, 141 Wn. App 485, 494, 170 P.3d 78 (2007). In ***State v. Riles***, the court determined that it is not permissible for a court to order plehtysmograph testing without also imposing crime-related treatment which would reasonably rely upon plethysmograph testing as a physiological assessment measure. 135 Wn.2d 326, 345, 957 P.2d 655 (1998) *overruled on other grounds by* ***State v. Valencia,*** 169 Wn.2d 782, 239 P.3d 1059 (2010). The court further noted

that plethysmograph testing yields data that may be useful regarding the sexual arousal patterns of sex offenders and be useful in assessing baseline arousal patterns for therapeutic progress. *Id.* at 344.

Here, defendant was ordered to participate in sexual deviancy treatment in addition to submitting to plethysmograph testing. CP 58. This treatment is considered crime related because defendant's sexual offence is repeated acts of child molestation. CP 42. Defendant's repeated sexual offences indicate that he has a sexual deviance problem that requires treatment. Thus, the trial court did not abuse its discretion in determining that sexual deviancy treatment coupled with plethysmograph testing would be useful in assessing defendant's arousal patterns and thereby decrease defendant's risk of re-offending.

b. The trial court did not err in prohibiting defendant from possessing pornographic materials as it is a proper crime related prohibition.

The trial court imposed condition 15, which stated:

> Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.

CP 58.

The trial court did not abuse its discretion by prohibiting the defendant from possessing sexually explicit materials. Condition 15 explicitly states that the sexual deviancy treatment provider will define

what pornographic materials are. CP 58. This condition might be problematic had the court ordered it independently of a treatment program. However, because the court properly mandated that the defendant undergo sexual deviancy treatment and left the definition of "pornographic" to the treatment provider, this condition is properly interpreted as part of that treatment.

4. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN PART WHEN IT IMPOSED CONDITION 13 LIMITING DEFENDANT'S ACCESS OF CONTROLLED SUBSTANCES TO THOSE ONLY ISSUED BY LICENSED PHYSICIANS.

This Court reviews de novo whether the trial court had statutory authority to impose certain conditions of community custody. ***State v. Acevedo***, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). A trial court may only impose statutorily authorized sentences. ***State v. Paulson***, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." *Id.* When the trial court imposes an unauthorized condition on community custody, this Court remedies the error by remanding the issue with instructions to strike the unauthorized condition. *See* ***State v. Jones***, 118 Wn. App. 199, 212, 76 P.3d 258 (2003).

Here, the court imposed condition 13, which stated that:

> You shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances without a valid prescription from a licensed physician.

CP 58.

There is no statutory authority to limit medications only to those prescribed by licensed physicians. As such, the court improperly limited defendant's access of controlled substances only to licensed physicians. Therefore, this Court should remand to strike the words "from a licensed physician" replace with "lawfully issued."

D. CONCLUSION.

The trial court did not abuse its discretion in revoking defendant's SSOSA, because defendant violated six separate conditions of his suspended sentence. The trial court also did not abuse its discretion in imposing community custody conditions requiring defendant undergo plethysmograph testing and prohibiting him from possessing pornography, as those were proper crime related conditions. The trial court exceeded its statutory authority in part when it limited defendant's access of controlled substances to those only issued by licensed physicians. Furthermore, the State concedes that an order should be entered to correct defendant's judgment and sentence to comply with the statutory maximum.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and uphold the conditions on defendant's community custody where the State has identified the sentencing court properly exercised its statutory authority above.

DATED: February 14, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

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Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-14-14
Date Signature

PIERCE COUNTY PROSECUTOR

February 14, 2014 - 4:20 PM

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