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Court of Appeals
Division I
State of Washington
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Supreme Court No. 95734-7
COA No. 75458-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER/DECISION BELOW

Ronald Richard Brown requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Brown, No. 75458-1-I, filed March 12, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992), four justices of this Court held that collateral estoppel precludes a trial court from imposing an exceptional sentence on remand following an appeal, if the court expressly declined to impose an exceptional sentence on the same basis at the original sentencing. This Court has continued to cite that opinion, carefully distinguishing it in other cases, and has never overruled it. Yet the Court of Appeals declined to follow Collicott, despite its similarity to this case on its facts, partly because the lead opinion was signed by only a plurality of justices. Should the Court grant review and clarify the continuing vitality of the lead opinion in Collicott? RAP 13.4(b)(1), (4).

2. Under the Due Process Clause, a presumption of vindictiveness arises if the court imposes a more serious sentence on remand following a successful appeal. The sentence on remand must

be consistent with the court's original sentencing intent. Here, Brown originally received a standard range sentence. After several of his convictions were reversed on appeal, the court imposed an exceptional sentence upward on remand. Although the total sentence on remand was less than the total original sentence, the sentence for each individual count was higher. Should this Court grant review and hold the sentence raises a presumption of vindictiveness? RAP 13.4(b)(1), (3), (4).

3. Under the Due Process Clause, a presumption of vindictiveness arises if the prosecutor unilaterally decides to bring a more serious charge against a defendant who exercises his right to appeal. The presumption is rebutted only if the prosecutor shows it was impossible to proceed on the more serious charge at the outset. Here, the prosecutor requested an exceptional sentence after Brown successfully attacked four convictions on appeal. Brown was prejudiced because the court likely would not have imposed the exceptional sentence but for the prosecutor's request. The prosecutor cannot show it was impossible to request an exceptional sentence at the outset. Should this Court grant review and hold the prosecutor's action was presumptively vindictive? RAP 13.4(b)(1),(3), (4).

C. STATEMENT OF THE CASE

This case arose out of an incident that occurred in December 2011. The facts are set forth in the Court of Appeals' first opinion. CP 59-88. Brown was originally convicted of two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree burglary, and two counts of second degree assault, all with firearm enhancements. CP 6, 101-02.

At the first sentencing before Judge Weiss, the State recommended a high-end standard-range sentence. The judge had authority to impose an exceptional sentence upward based on Brown's high offender score which resulted in some of the current offenses going "unpunished." 3/12/13RP 12. But the deputy prosecutor did not recommend an exceptional sentence. Id.

Judge Weiss expressly declined to impose an exceptional sentence at the first sentencing. He said an exceptional sentence was unwarranted based on the facts of the case. The judge explained, "the Munsons were pretty clear in their testimony . . . that they believed that if you were not there that their lives were in jeopardy. So I'm giving you credit from that standpoint such that I'm not imposing an

exceptional sentence . . . ." 3/12/13RP 21; 6/21/16RP 33. The court imposed a standard-range sentence of 638 months. CP 91.

Brown appealed. The Court of Appeals reversed the two first degree kidnapping convictions based on instructional error and vacated the two second degree assault convictions on double jeopardy grounds. CP 59-88. The court "remand[ed] with instructions that the trial court enter orders vacating these convictions and for resentencing." CP 88.

On remand, the State elected not to retry Brown on the kidnapping charges. 6/21/16RP 2-3. Brown's offender score was substantially reduced. Nonetheless, the State requested an exceptional sentence based on Brown's offender score. 6/21/16RP 25-26. The State requested an exceptional sentence of 638 months—287 months above the top of the standard range. 6/21/16RP 21-22, 25-26.

Judge Weiss, the original sentencing judge, agreed to impose an exceptional sentence, although for less time than the State requested. 6/21/16RP 32-34. The judge acknowledged he had not imposed an exceptional sentence at the original sentencing, based on the facts of the case. 3/12/13RP 21; 6/21/16RP 33. But this time he thought an exceptional sentence was appropriate based on the aggravating factor set forth in RCW 9.94A.535(2)(c) ("The defendant has committed

multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."). 6/21/16RP 34-35. This was despite the fact that Brown's offender score had substantially *decreased* from a 19 to an 11. CP 9, 91. The court imposed an exceptional sentence upward of 399 months. 6/21/16RP 36; CP 11, 21-22.

Brown appealed again. He argued the trial court was precluded by the doctrine of collateral estoppel from imposing an exceptional sentence on remand on the same basis that the court had expressly rejected at the first sentencing. He also argued the exceptional sentence was presumptively vindictive on the part of the court and the prosecutor, in violation of due process. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because the Court of Appeals' opinion affirming the exceptional sentence, where the trial court had expressly declined to impose an exceptional sentence on the same basis at the original sentencing, conflicts with State v Collicott.

The Court of Appeals erroneously concluded that the trial court was permitted to impose an exceptional sentence on remand on the same basis that it had expressly rejected at the first sentencing. The Court of Appeals' opinion directly conflicts with this Court's lead

opinion in State v. Collicott, which held that the doctrine of collateral estoppel precludes a trial court from imposing an exceptional sentence on remand, if the court expressly declined to impose an exceptional sentence on that same basis at the original sentencing. This Court should grant review and affirm the holding of the lead opinion in Collicott, which was signed by only a plurality of four justices. RAP 13.4(b)(1), (4).

Once a trial court has expressly decided not to impose an exceptional sentence, it should not be allowed to revisit that decision unless the relevant circumstances have changed. Here, the relevant circumstances had not changed. In fact, the asserted basis for imposing the exceptional sentence—Brown's high offender score resulting in some of the current offenses going unpunished—had become *less* compelling after the Court of Appeals reversed several of his convictions, causing his offender score to decrease substantially. The trial court was collaterally estopped from imposing an exceptional sentence on that basis at resentencing.

"The doctrine of collateral estoppel applies in criminal cases and bars relitigation of issues already adjudicated." State v. Collicott, 118 Wnd 649, 660, 827 P.2d 263 (1992). "Collateral estoppel promotes

judicial economy and prevents inconvenience, and even harassment, of parties." Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (internal quotation marks and citation omitted).

"Collateral estoppel in criminal cases is 'not to be applied with a hypertechnical and archaic approach . . . but with realism and rationality.'" State v. Eggleston, 129 Wn. App. 418, 427, 118 P.3d 959 (2005) (quoting Ashe v. Swenson, 397 U.S. 437, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)).

In a criminal case, the application of collateral estoppel is a two-step process. Collicott, 118 Wn.2d at 660-61. The first is to determine what issues were raised and resolved by the former judgment, and the second is to determine whether the issues raised and resolved in the former prosecution are identical to those sought to be barred in the subsequent action. Id. In general, collateral estoppel precludes the retrial of issues decided in a prior action. Id.

In Collicott, the lead opinion concluded that collateral estoppel precludes a judge from imposing an exceptional sentence on remand following an appeal if the judge already determined at the first sentencing that an exceptional sentence was not warranted on those same grounds. Collicott, 118 Wn.2d at 663-64. There, at the first

sentencing, the judge specifically declined to impose an exceptional sentence on the basis of deliberate cruelty. Id. at 661. This Court stated, "[a]fter considering these issues at the first sentencing and having determined that no exceptional sentence would be imposed, the trial court is estopped from now imposing an exceptional sentence based on a repeat assertion by the State of deliberate cruelty to the victim." Id.

Collicott was decided by a four-justice plurality of the Court. Although the Court subsequently characterized its discussion of collateral estoppel as "dicta," it has not overruled that decision. See State v. Harrison, 148 Wn.2d 550, 560, 61 P.3d 1104 (2003); State v. Tili, 148 Wn.2d 350, 363-64, 60 P.3d 1192 (2003). Instead, the Court has carefully distinguished Collicott on its facts. See Harrison, 148 Wn.2d at 560 ("[Collicott] is distinguishable because it did not deal with the breach of a plea agreement by the State"); Tili, 148 Wn.2d at 364 ("By this opinion we do not overrule [Collicott] as we find it to be distinguishable on the facts."). By contrast, Collicott is not distinguishable from this case on its facts.

Under the lead opinion in Collicott, the trial court in this case was estopped from imposing an exceptional sentence on remand after

having specifically determined at the first sentencing that an exceptional sentence was not warranted on the basis of Brown's high offender score. See 3/12/13RP 21. In other words, the court had already determined that Brown's offender score was not "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." State v. O'Dell, 183 Wn.2d 680, 690, 358 P.3d 359 (2015). The identical issue raised at the second sentencing was already raised and resolved. Brown's offender score actually *decreased* between the first and second sentencings. It therefore could not have become a "substantial and compelling" reason to justify imposing an exceptional sentence.

Contrary to the Court of Appeals opinion, State v. Tili is not controlling. In Tili, the defendant was convicted of three counts of first degree rape. 148 Wn.2d at 356. The trial court considered the rapes as separate and distinct conduct and ordered the sentences to run consecutively. Id. at 357. At the same time, the court stated, "should the multiple rapes be considered the same criminal conduct on appeal, the same sentence would be imposed, as an exceptional sentence upward, justified by deliberate cruelty and vulnerability of the victim." Id. As predicted, on appeal, this Court held the three rapes actually

constituted the same criminal conduct. At resentencing, the court imposed the same-length sentence as an exceptional sentence, based on deliberate cruelty and vulnerability of the victim. Id.

Tili held that collateral estoppel did not bar the exceptional sentence because the second sentencing context was different, in that the convictions remained the same but the presumptive sentence had significantly reduced. Id. at 362-63. Further, the trial court had expressly stated it would impose an exceptional sentence if it was later determined the three rapes constituted the same criminal conduct. Id. Thus, "[t]here being no identity of the issues, the trial court was not collaterally estopped from imposing an exceptional sentence at the resentencing." Id.

Here, by contrast, the issues at Brown's resentencing were identical for purposes of a collateral estoppel analysis. Brown's presumptive sentence had significantly decreased, but only because four of the convictions were either reversed or vacated. Thus, his culpability had decreased. The court had not miscalculated the offender score or imposed an illegal sentence, as in Tili. Moreover, unlike in Tili, the trial court here expressly found at the first sentencing that an exceptional sentence was *not* warranted on the same ground

urged by the State at the second sentencing. The new sentence was not consistent with the court's original sentencing intent.

This Court should grant review and hold the court was collaterally estopped from imposing an exceptional sentence on the same basis it had already considered and rejected.

2. This Court should grant review and hold that, when some of a defendant's convictions are reversed on appeal, the trial court may not increase the sentences for the individual remaining counts on remand.

The Court of Appeals unreasonably held that the sentence Brown received on remand was not presumptively vindictive simply because the new total sentence was shorter than the original total sentence. See Slip Op. at 4-6. The court's decision to impose an exceptional sentence on the counts that remained following the first appeal, resulting in a higher sentence for those counts than what Brown originally received, was not consistent with its original sentencing intent. This raises a presumption of vindictiveness.

Due process precludes a trial court from imposing a heavier sentence upon a reconvicted defendant for the purpose of punishing him for having succeeded in getting his original sentence set aside. North Carolina v. Pearce, 395 U.S. 711, 723-24, 89 S. Ct. 2072, 23 L.

Ed. 2d 656 (1969); U.S. Const. amend. XIV; Const. art. I, § 3. A presumption of vindictiveness arises when a judge imposes a more severe sentence after a defendant appeals, unless the judge's reasons "affirmatively appear" and are "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Pearce, 395 U.S. at 726.

In a multi-count case where some counts are dismissed following a successful appeal, it is presumptively vindictive to impose a sentence on the remaining counts that is greater than what the defendant originally received for those counts. Even if the total aggregate sentence is the same, or less, the sentence for the remaining counts is greater than what the court originally imposed and is inconsistent with the original sentencing intent. Enhancing the sentence on the remaining counts after some counts have been dismissed following a successful appeal violates the spirit of Pearce and should not be permitted.

The "modified aggregate" approach is more suited to this situation than the "total aggregate" approach applied by the Court of Appeals. Under the "modified aggregate" approach, when a reviewing

court assesses a sentence imposed at resentencing in a multi-count case after some counts have been dismissed following an appeal, the court first disregards the sentence originally imposed on the dismissed counts and then compares the total remaining sentence with the sentence imposed at resentencing. United States v. Monaco, 702 F.2d 860, 885 (11th Cir. 1983); United States v. Markus, 603 F.2d 409, 413 (2d Cir. 1979). If the second sentence is greater than the valid aggregate sentence originally received, this raises a presumption of vindictiveness. If the presumption is not rebutted, the sentence violates due process. Monaco, 702 F.2d at 885.

Applying the "modified aggregate" approach in a multi-count case where some counts are dismissed following an appeal avoids the risk of judicial self-vindication and vindictiveness that may naturally arise. Jonathan D. Youngwood, Comment: The presumption of judicial vindictiveness in multi-count resentencing, 60 U. Chi. L. Rev. 725, 750-52 (Spring 1993). The "total aggregate" approach applied by the Court of Appeals, on the other hand, permits judicial self-vindication by allowing a judge to reaffirm his or her initial sentence. Id.

This Court has never addressed this scenario or decided whether to apply the "modified" or the "total" aggregate approach.

In applying the "total" aggregate approach, the Court of Appeals relied upon State v. Larson, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989) (cited at Slip Op. at 4). But that case is distinguishable and does not justify applying the "total" aggregate approach in a case like this, where several convictions are dismissed following an appeal.

In Larson, the defendant was convicted of first degree murder, second degree rape, and first degree arson. At sentencing, the trial court commented the murder was "egregious" and noted its intent to sentence Larson "to life" for the murder and rape. The court imposed consecutive sentences totaling 363 months. Id. at 324-25. The Court of Appeals affirmed the convictions but reversed the sentence, holding consecutive sentences were not authorized. Id. at 325. On remand, the trial court imposed essentially the same sentence of 360 months, which was within the standard range for the murder. Id. at 326. This did not give rise to a presumption of vindictiveness because Larson's "revised aggregate sentence is less severe than his original aggregate sentence." Id. at 328. Also, "the 'increase' in the murder sentence is fully explained by the trial court's original sentencing intent." Id.

Unlike in Larson, four of Brown's convictions were dismissed following his appeal. Also, the court imposed an exceptional sentence

on remand after expressly declining to impose one at the original sentencing. Originally, the court stated an exceptional sentence was not appropriate based on the facts of the case. 3/12/13RP 21. These circumstances had not changed. Unlike in Larson, the court's decision to impose an exceptional sentence on remand was not consistent with its original sentencing intent.

The purpose of the Pearce rule is to counteract the natural possibility that the judge, or the prosecutor, will have a personal stake in the prior sentence and a motivation to engage in self-vindication. Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973). Applying the "modified aggregate" approach when a court resentences a defendant after some counts are dismissed following a successful appeal best protects a defendant against judicial and prosecutorial vindictiveness and self-vindication and best effectuates the purposes of the Pearce rule.

3. This Court should grant review and hold the State's request for an exceptional sentence on remand that was equivalent in length to the original sentence, notwithstanding the dismissed counts, was presumptively vindictive.

The Court of Appeals unreasonably concluded the prosecutor's request for an exceptional sentence on remand that was equivalent in

length to the sentence Brown originally received was not presumptively vindictive. The State requested an exceptional sentence of 638 months. The trial court imposed an exceptional sentence of 399 months. The Court of Appeals held the State's conduct did not violate due process because "[i]n view of the rejection of the recommendation and imposition of a substantially lower sentence, we fail to see any prejudice." Slip Op. at 19.

This reasoning is erroneous because it is unlikely the court would have imposed an exceptional sentence of any length if not for the State's request. Brown was prejudiced because, had the State not asked for an exceptional sentence, the court would likely have imposed a sentence within the standard range.

The exceptional sentence requested by the State at the second sentencing was nearly 24 years above the top of the standard range and is equivalent to the sentence Brown originally received. The State's action is presumptively vindictive. The circumstances create a realistic likelihood the State was acting in retaliation for Brown's decision to exercise his right to appeal.

Due process prohibits the prosecutor from retaliating against a defendant for exercising his right to appeal. State v. Korum, 157

Wn.2d 614, 627, 141 P.3d 13 (2006); Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); U.S. Const. amend. XIV; Const. art. I, § 3.

A presumption of vindictiveness arises when "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness" on the part of the prosecutor. Korum, 157 Wn.2d at 627 (internal quotation marks and citation omitted). The due process violation lies "not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." Bordenkircher, 434 U.S. at 363.

A presumption of vindictiveness arises when the prosecutor unilaterally decides to bring more serious charges against a defendant who exercises his right to appeal. Perry, 417 U.S. at 28-29.

Here, the prosecutor's action had a similar effect to bringing more serious charges against Brown after he appealed his convictions. The State requested an exceptional sentence at the second sentencing after it had expressly declined to request an exceptional sentence at the first sentencing. See 3/12/13RP 12; 6/21/16RP 21. The effect is that Brown received an exceptional sentence following his appeal, where he

had originally received a standard-range sentence. These circumstances raise a presumption of vindictiveness in violation of due process.

The presumption of vindictiveness may be rebutted by the government if it demonstrates objective evidence justifying the action. Korum, 157 Wn.2d at 627-28. The prosecutor's reasons "must affirmatively appear" and "be based upon objective information" not known to the prosecutor at the time of the original charging decision. See Pearce, 395 U.S. at 726.

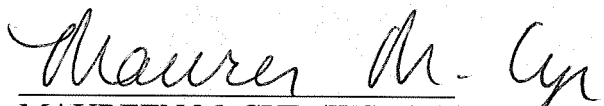
The State cannot rebut the presumption of vindictiveness. The State requested an exceptional sentence on the basis that Brown's offender score was so high that some of the current offenses would go unpunished. CP 32-36; see RCW 9.94A.535(2)(c). These circumstances existed and were known to the prosecutor at the time of the original sentencing. The prosecutor could have but did not request an exceptional sentence on that basis at that time. In fact, the asserted justification for an exceptional sentence had significantly *diminished.* Brown's offender score for the most serious offense actually *decreased* following his appeal—from a 19 to an 11. CP 9, 91.

Because the prosecutor's actions violated due process, the exceptional sentence must be reversed.

E. CONCLUSION

For the reasons provided, this Court should grant review, reverse the exceptional sentence, and remand for resentencing within the standard range.

Respectfully submitted this 11th day of April, 2018.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHNGTON,	)	No. 75458-1-I
Respondent,	)	DIVISION ONE
v.	)	
RONALD RICHARD BROWN,	)	UNPUBLISHED
Appellant.	)	FILED: March 12, 2018

Cox, J. — Ronald Brown appeals the exceptional sentence imposed upon remand following his successful appeal of his first judgment and sentence. He contends that the sentence is presumptively vindictive. For the first time in this second appeal, he also contends that the State failed in its burden to prove the facts necessary to establish his offender score. Finally, he challenges certain conditions of community custody that the trial court imposed.

We conclude that Brown fails in his burden to show that the new sentence imposed is presumptively vindictive. And he does not argue that it is actually vindictive. He failed to preserve below on remand his challenge to whether the State proved his offender score and he does not establish that the claim falls within the narrow exception of RAP 2.5(a). But he correctly argues that certain

conditions of community custody are improper. We affirm in part, reverse in part, and remand with directions.

In 2011, Brown, along with several accomplices, entered the home of two victims, restrained them, threatened them with guns, and robbed them.[1] A jury convicted Brown of two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree burglary, and two counts of second degree assault. The jury also found that he was armed with a firearm while committing these crimes, requiring imposition of mandatory firearm enhancements by the court.

The trial court calculated the relevant offender scores and standard ranges at sentencing. Brown's offender score was 17. While the trial court concluded that an exceptional sentence was legally justified, the court chose not to impose one. It did so on the basis that the appropriate length of the aggregate sentence was 638 months.

Brown appealed, and this court reversed the kidnapping counts based on an instructional error.[2] This court also vacated the assault counts, concluding that they merged with the robberies.[3] It remanded the case for retrial on the reversed counts as well as for resentencing on the remaining convictions.[4]

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[1] State v. Brown, No. 70148-7-I, slip op. at *1 (Wash. Ct. App. Jul. 27, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/701487.pdf.

[2] Id. at *4.

[3] Id. at *8.

[4] Id. at *14.

At the resentencing hearing, the State sought dismissal without prejudice of the two kidnapping counts. The original sentencing judge granted this motion.

The State recommended that the trial court impose the same 638 month term as originally imposed, this time as an exceptional upward sentence. Brown sought a sentence at the low end of the standard range.

The judge rejected both recommendations and sentenced Brown for the remaining three convictions: two of first degree robbery and one of first degree burglary, each with the mandatory firearm enhancements. The aggregate sentence is for a term of 399 months. The court also imposed certain community custody conditions as part of the resentencing.

Brown appeals.

JUDICIAL VINDICTIVENESS

Presumptive Vindictiveness

Brown argues that the trial court abused its discretion by imposing presumptively vindictive sentences upon remand. We disagree.

Constitutional due process under the Fourteenth Amendment requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" upon remand.[5] The United States Supreme Court established, in North Carolina v. Pearce, a

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[5] North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

presumption of vindictiveness that may arise in certain circumstances.[6] Actual vindictiveness may be grounds for reversal if proven by the defendant.[7]

The threshold question in each case is whether the sentence on remand is "more severe."[8] In State v. Larson, this court adopted the view of federal courts on this question.[9] Those courts "uniformly hold that the Pearce presumption never arises when the ***aggregate*** period of incarceration remains the same or is reduced on remand."[10] Notably, the Ninth Circuit Court of Appeals has held to this approach, explaining that the purpose of the Pearce presumption is protected "[i]f there is a possibility of a sentence reduction and no risk of a sentence increase."[11]

Here, Brown fails in his burden to show that the Pearce presumption arises. The trial court initially imposed an aggregate sentence of 638 months.

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[6] Id.

[7] State v. Larson, 56 Wn. App. 323, 328, 783 P.2d 1093 (1989).

[8] State v. Ameline, 118 Wn. App. 128, 133, 75 P.3d 589 (2003); Larson, 56 Wn. App. at 326.

[9] 56 Wn. App. 323, 328, 783 P.2d 1093 (1989).

[10] Larson, 56 Wn. App. at 326; see United States v. Nerius, 824 F.3d 29 (3d Cir. 2016); United States v. Fowler, 749 F.3d 1010 (11th Cir. 2014); United States v. Bentley, 850 F.2d 327 (7th Cir. 1988), cert. denied, 488 U.S. 970, 109 S. Ct. 501, 102 L. Ed. 2d 537, rehearing denied, 488 U.S. 1051, 109 S. Ct. 885, 102 L. Ed. 2d 1008 (1989); United States v. Diaz, 834 F.2d 287 (2nd Cir. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988); United States v. Cataldo, 832 F.2d 869 (5th Cir. 1987), cert. denied, 485 U.S. 1022, 108 S. Ct. 1577, 99 L. Ed. 2d 892 (1988); United States v. Shue, 825 F.2d 1111, 1115 (7th Cir. 1987), cert. denied, 484 U.S. 956, 108 S. Ct. 351, 98 L. Ed. 2d 376 (1987).

[11] United States v. Horob, 735 F.3d 866, 871 (9th Cir. 2013).

Upon resentencing, it imposed an aggregate sentence of 399 months. Under State v. Larson and related federal authorities, the shorter aggregate length of the second sentence precludes application of the presumption.

Notably, a fair reading of the sentencing court's reasoning fails to show otherwise. It appears that the court imposed an exceptional sentence on remand under the "free crime" rule because Brown's offender score was still eleven, above the score of nine, implicating this rule. And the length of the sentence imposed included consideration of the sentence imposed on a Brown accomplice after Brown's original sentencing. In short, nothing in the record before us suggests either presumptive or actual vindictiveness.

Notwithstanding that his current aggregate sentence is substantially lower than his original aggregate sentence, Brown relies on State v. Ameline[12] to support his argument. That reliance is misplaced.

In that case, William Ameline was tried and sentenced three times for second degree murder.[13] After the first trial, the trial court imposed a 164-month standard range sentence.[14] Ameline appealed, securing a reversal and remand. He was convicted again and sentenced to the same term.[15] He appealed, secured another reversal and remand, and faced trial again.[16] He was convicted

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[12] 118 Wn. App. 128, 75 P.3d 589 (2003).

[13] Id. at 130.

[14] Id.

[15] Id. at 131.

[16] Id.

a third time, but this time the trial court imposed an exceptional sentence of 240 months.[17]

Division Two of this court applied the Pearce presumption and set aside the third sentence because it exceeded, in the aggregate, the original sentence.[18] Thus, Ameline does not alter the principles we just discussed.

Brown further contends that two opinions from other jurisdictions, State of Oregon v. Bradley[19] and In re Matter of Craig,[20] support his position. Because there is precedent in this state that supports the result we follow, we have no reason to look to other jurisdictions to decide this question. In any event, his reliance on those cases is misplaced.

Bradley does not support Brown's position. In that case, the Oregon Court of Appeals considered a sentence imposed upon Ronald Bradley following reversal of several convictions for sexual abuse of a child.[21] On remand, the trial court imposed a sentence that still took into account the reversed convictions

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[17] Id.

[18] Id. at 133.

[19] 281 Or. App. 696, 383 P.3d 937 (2016), review denied, 361 Or. 645 (2017).

[20] 571 N.E.2d 1326 (Ind. Ct. App. 1991).

[21] 281 Or. App. at 698.

based upon the "strong possibility" that the State might not retry them.[22] But the aggregate sentence was shorter than that originally imposed.[23]

Following the Pearce presumption discussed above, the court of appeals concluded that no presumption of vindictiveness had arisen.[24]

The court then turned to the related question: whether actual vindictiveness was supported by the record.[25] The court concluded that the sentence "should not have been increased such that the prosecution would be relieved of its burden to prove the reversed counts beyond a reasonable doubt. That is the essence of punishing defendant for his success on appeal."[26] The trial court's reliance on the reversed convictions presented an unconstitutionally vindictive and "impermissible consideration in increasing the sentence imposed" upon the remaining counts.[27]

Bradley does not stand for the proposition that the presumption of vindictiveness arises under the circumstances of this case. Rather, it holds that actual vindictiveness may be found where the resentencing court increases the sentence on remaining counts ***on the basis*** of reversed counts. There is nothing in this record to show that was done here.

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[22] Id. at 699 (internal quotation marks omitted).

[23] Id. at 700.

[24] Id. at 701.

[25] Id.

[26] Id. at 703.

[27] Id. at 704.

Brown further relies upon the Indiana Court of Appeals decision in Craig. That court also recognized that the presumption of vindictiveness does not arise "where an aggregate sentence is reduced, but some of the interdependent sentences in a 'sentencing package' are increased following a successful appeal of some of the individual counts."[28]

In the case below, the trial court had found Pierre Craig guilty of three counts of criminal contempt for refusal to testify.[29] Those counts were reversed on the basis that they constituted only a single act of contempt.[30] But the resentencing court imposed the identical sentence originally imposed for the three counts.[31]

The court of appeals reversed this sentence, holding "that after reversal of a sentence erroneously entered for multiple acts of criminal contempt, it is a denial of due process to impose a sentence any greater than the original sentence for each single act of contempt."[32] It explained that the presumption of vindictiveness arose because the resentencing court imposed a sentence in excess of that attendant to a single count of contempt and more proper to the three-count conviction already reversed.[33]

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[28] 571 N.E.2d at 1327-28.

[29] Id. at 1327.

[30] Id.

[31] Id.

[32] Id. at 1328.

[33] Id.

The Indiana Court of Appeals subsequently clarified in Sanjari v. State that it "join[s] with that vast majority of courts who have addressed the question and have concluded that it is the aggregate sentence that is the key in such cases."[34] The defendant in that case initially had been convicted of two class C felonies, each carrying a five-year sentence, to be served consecutively.[35] On appeal, one of the convictions was reduced to a Class D felony.[36] The resentencing court then imposed an eight-year sentence on the remaining Class C felony, and two years on the reduced class D felony, resulting in a sentence equivalent to that originally imposed.[37] Because the resentencing court could permissibly view the individual sentences as part of an overall plan, and flexibly impose an accordant sentence, its action was not presumptively vindictive.[38]

In his reply brief, Brown argues that Washington should adopt the "modified aggregate" approach to the Pearce presumption propounded by the Eleventh and Second Circuit Courts of Appeals. Because this argument was first raised in the reply brief, we choose not to address it.[39]

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[34] 981 N.E.2d 578, 582 (Ind. Ct. App. 2013).

[35] Id. at 580.

[36] Id.

[37] Id.

[38] Id. at 582.

[39] Deutsche Bank Nat. Trust. Co. v. Slotke, 192 Wn. App. 166, 177, 367 P.3d 600, review denied, 185 Wn.2d 1037 (2016).

Actual Vindictiveness

Brown does not argue that this record supports the related question of actual vindictiveness by the trial court in imposing the sentences now before us. In any event, we see nothing in this record to support such a claim.

Collateral Estoppel

Brown next argues that the trial court was barred by collateral estoppel from imposing an exceptional sentence after expressly declining to do so at the time of the initial sentencing. We hold that collateral estoppel is not a bar to this resentencing.

Collateral estoppel arises from the constitutional guaranties against double jeopardy.[40] Under this doctrine, "'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'"[41] The supreme court has applied collateral estoppel in the criminal context.[42] Courts do not apply it hypertechnically "but with realism and rationality."[43]

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[40] State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003).

[41] Id. (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)).

[42] Id.

[43] Id. at 361.

The Ameline court held that collateral estoppel only operates after a judgment becomes final, and a judgment reversed on appeal and remanded for resentencing is not final for these purposes.[44]

Here, as in Ameline, the original sentence never became final because Brown timely appealed that sentence. The sentence was reversed and the case remanded for resentencing. Thus, a necessary element of collateral estoppel is absent: there is no final judgment. On this basis alone, we reject the collateral estoppel argument.

But this argument fails for other reasons as well. Analysis of collateral estoppel also requires the court to identify the issue subject to the previous valid and final judgment.[45] Then the court must determine if that issue is identical to the issue litigated in a subsequent proceeding.[46] Even if the original sentence constituted a final judgment, which it does not, Brown's argument still fails.

Two distinct issues come into play when a trial court considers whether to impose an exceptional sentence.[47] First, the fact finder must determine beyond a reasonable doubt the presence of relevant circumstances to justify an exceptional sentence.[48] Second, the trial court must make a discretionary determination, whether an exceptional sentence is appropriate in light of those

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[44] Ameline, 118 Wn. App. at 134.

[45] Id.

[46] Id.

[47] State v. Rowland, 160 Wn. App. 316, 330, 249 P.3d 635 (2011).

[48] Id.

circumstances.[49] When a sentence is reversed and remanded for resentencing, the second step may occur under new circumstances.[50]

State v. Tili[51] is instructive. In that case, Fonotaga Tili sexually assaulted L.M., penetrating her numerous times.[52] Along with other charges, the State charged separate counts for each penetration, and Tili was convicted of all counts.[53]

The original sentencing court declined to impose an exceptional upward sentence, opining that the appellate court would likely reverse such a sentence "if the rapes were considered separate and distinct conduct."[54] But the court also explained that if they were reversed on that basis, it would impose the same sentence of 417 months as an exceptional upward sentence, based on deliberate cruelty and vulnerability of the victim.[55]

As predicted, the supreme court reversed the separate rape convictions, concluding that they constituted the same criminal conduct for sentencing

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[49] Id.

[50] Tili, 148 Wn.2d at 365.

[51] 148 Wn.2d 350, 60 P.3d 1192 (2003).

[52] Id. at 355-56.

[53] Id. at 356.

[54] Id. at 357.

[55] Id.

purposes.[56] And, as the trial court stated, it imposed the same sentence on remand as an exceptional upward sentence.[57]

Tili appealed and made the same argument Brown makes here.[58] He contended the trial court was "collaterally estopped from imposing the exceptional sentence at the resentencing because he believe[d] that issue was already considered and rejected with finality at the first sentencing."[59]

The supreme court rejected this argument.[60] It explained that "the issue at the resentencing was fundamentally different" from that present at the original sentencing.[61] Specifically, the sentencing court faced different standard ranges before and following remand.[62] Thus, the context controlling whether an exceptional upward sentence was appropriate had changed.[63] And with that context changed, the trial court could "'choose again to consider whether the presumptive sentence is clearly too lenient' after recalculating the offender score."[64]

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[56] Id.

[57] Id.

[58] Id. at 360.

[59] Id. at 361.

[60] Id. at 363.

[61] Id.

[62] Id.

[63] Id.

[64] Id. at 365 (quoting State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992)).

Here, the original sentencing court found that circumstances existed that could legally justify an exceptional upwards sentence. But it had to determine whether such an upward departure was appropriate when the top end of the standard range was 638 months. Under those circumstances, the court chose not to impose an exceptional sentence because the length of the sentence was appropriate under the circumstances.

Upon remand, the sentencing judge had to determine whether a top end standard sentence was appropriate. It concluded it was not because of the free crime rule. It, accordingly, exercised its discretion to impose an exceptional upward sentence. The issues were not the same.

The trial court discussed at length this change in circumstances. At the original sentencing, the trial court held that it had the power to impose an exceptional sentence based on Brown's offender score but concluded that that imposition was unnecessary in light of the applicable standard range. On resentencing, it concluded that an exceptional upward sentence was appropriate in light of the "free crime rule" and the new relevant standard range.

Based on this reasoning, the trial court extrapolated out what the standard range would dictate based on Brown's higher offender score. The court found that score to be 11, a fact undisputed on appeal. It imposed an exceptional upward sentence based upon that extrapolation.

The trial court also explained that it would not follow the State's recommendation to impose the original term of 638 months because of the sentence imposed on an accomplice since Brown's initial sentencing. The court

explained that "in relation to what [Brown's] original sentence was compared to what [the accomplice] got, if I follow the original sentence I think it's too far out of the lines of being reasonable."[65]

Brown primarily relies on the supreme court's four justice plurality in the lead opinion in State v. Collicott.[66] But the majority opinion in that case, signed by five justices, teaches that this reliance is misplaced.

Eric Collicott had been convicted for burglary, rape, and kidnapping.[67] At initial sentencing, the trial court had declined to impose an exceptional upward sentence.[68] In doing so, it apparently rejected the State's argument that the crime had been deliberately cruel.[69] The trial court concluded that Collicott's crimes constituted the same criminal conduct and sentenced Collicott within the standard range.[70] Collicott appealed.

The supreme court agreed that the crimes constituted the same criminal conduct, but concluded that the sentencing court had erred in calculating the offender score.[71] It remanded for the narrow task of recalculating that score.[72]

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[65] Report of Proceedings (June 21, 2016) at 34.

[66] 118 Wn.2d 649, 827 P.2d 263 (1992).

[67] Id. at 650 (plurality opinion).

[68] Id. at 661 (plurality opinion).

[69] Id. (plurality opinion).

[70] Id. at 651 (plurality opinion).

[71] Id. at 652-53 (plurality opinion).

[72] Id. (plurality opinion).

Upon resentencing, the trial court imposed an exceptional upward sentence based upon Collicott's deliberate cruelty and the "clearly too lenient" nature of the standard range.[73]

On the second appeal, a plurality of justices concluded in the lead opinion that, given the narrow scope of remand, "the trial court could not at resentencing impose an exceptional sentence based on aggravating factors which were considered in the prior sentencing and rejected as a basis for an exceptional sentence."[74] But a majority of the court in an opinion authored by a concurring justice held that they would not have reached the issue of collateral estoppel, or this conclusion.[75]

In Tili, the supreme court subsequently held that Collicott's conclusion is "not mandatory authority regarding the use of collateral estoppel in exceptional sentencing and may be considered dicta."[76] The Tili court also distinguished the holding in Collicott's lead opinion.[77] It explained that the supreme court in Collicott had not altered the sentencing context by its earlier reversal.[78] It had not reversed convictions or findings justifying an exceptional sentence. Rather, it

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[73] Id. at 654 (plurality opinion).

[74] Id. at 663-64 (plurality opinion).

[75] Id. at 669-70 (Durham, J., concurring).

[76] Tili, 148 Wn.2d at 364.

[77] Id.

[78] Id.

remanded solely for recalculation of the offender score.[79] Thus, the resentencing court there had faced an unchanged context, and made a decision at odds with the one previously rejected.

Here, the context at resentencing was like Tili, not Collicott. This court's earlier reversal of several of Brown's convictions changed the context for resentencing. The trial court had to consider a different standard range and determine whether an exceptional upward sentence was appropriate in light of the reversals. Thus, the issue at each sentencing proceeding differed and collateral estoppel did not preclude the sentence imposed on remand.

In sum, there is neither a presumption of vindictiveness nor actual vindictiveness shown by this record. Accordingly, we reject Brown's claim of error.

PROSECUTORIAL VINDICTIVENESS

Brown also argues that the State acted with presumptive vindictiveness. He bases this argument on the State's recommendation at resentencing of an exceptional sentence of 638 months, the same sentence imposed prior to reversal and remand. Because Brown fails to show prejudice from this recommendation, which the trial court rejected, we conclude that he fails in his burden of proof.

The United States Supreme Court has extended the Pearce presumption to review of prosecutorial conduct directed against a defendant who has

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[79] Id.

exercised his right to challenge his conviction.[80] It has concluded that such a defendant "convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."[81]

The supreme court has further explained that a prosecutorial action is vindictive "'only if ***designed*** to penalize a defendant for invoking legally protected rights.'"[82] A defendant can demonstrate that the prosecutor's conduct was presumptively vindictive when "'all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.'"[83]

A defendant alleging that a prosecutor has committed some kind of misconduct "must show a substantial likelihood that the misconduct affected" the result.[84]

Here, Brown argues that the State's sentencing recommendation on remand was presumptively vindictive. There is no argument that it is actually vindictive.

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[80] Blackledge v. Perry, 417 U.S. 21, 27, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).

[81] Id. at 28.

[82] State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006) (quoting United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)).

[83] Id. (quoting Meyer, 810 F.2d at 1246).

[84] State v. Houston-Sconiers, 188 Wn.2d 1, 31, 391 P.3d 409 (2017).

More importantly, Brown fails to explain how the sentencing recommendation, which the court rejected, resulted in prejudice to him. In view of the rejection of the recommendation and imposition of a substantially lower sentence, we fail to see any prejudice.

At oral argument of this case, Brown speculated that prejudice exists because the sentencing judge imposed an exceptional sentence after not doing so at the first sentencing. We have already discussed why the sentencing judge properly imposed an exceptional sentence the second time. Thus, the record simply does not support Brown's speculative argument of prejudice.

PROOF OF OFFENDER SCORE

For the first time on appeal, Brown argues that the trial court abused its discretion by including two convictions which the State allegedly failed to prove had not washed out. Because Brown cannot make this argument for the first time on his second appeal, having failed to make it in the first appeal or on remand, we decline to reach this issue.

A defendant who has appealed his conviction, had it remanded, and appealed again, generally cannot raise issues from the original proceeding for the first time on his second appeal.[85] But a defendant "may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding."[86] This is compatible with the recognition that the context on resentencing has changed.

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[85] State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983).

[86] State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

RAP 2.5(a) requires Brown to have raised this issue at the resentencing to preserve the issue on appeal. He failed to do so. And he makes no argument on appeal why RAP 2.5(a) applies. Thus, we decline to reach the issue.

COMMUNITY CUSTODY CONDITIONS

Brown argues that the trial court improperly imposed certain conditions of community custody relevant to drug treatment. He does not contest other conditions imposed.

We first consider the majority of the challenged conditions, and then separately consider the imposition of a condition precluding Brown from "drug areas."

General Drug-Related Conditions

Brown challenges conditions requiring that he not possess drug paraphernalia, and that he participate in certain substance counseling, treatment, and offender programs, and submit to urinalysis, Breathalyzer, and polygraph tests. These conditions are listed in an appendix to the judgment and sentence as conditions 5, 7, 8, and 9. We agree with his challenges to the conditions concerning drug paraphernalia and substance counseling, treatment, and offender programs. The State concedes error on these. But we disagree with Brown's challenge to the urinalysis, Breathalyzer, and polygraph conditions.

The trial court's sentencing authority depends on statute.[87] Generally, this court reviews for abuse of discretion the imposition of sentencing requirements.[88]

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[87] In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

[88] State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

But we review de novo that imposition when the trial court's statutory sentencing authority is challenged.[89]

The Sentencing Reform Act authorizes the trial court to impose certain prohibitions or affirmative conditions of community custody so long as they are "crime-related."[90] A prohibition is "crime-related" when it "directly relates to the circumstances of the crime for which the offender has been convicted."[91]

Thus, a trial court may only impose certain drug-related conditions when the evidence shows that drugs contributed to the crime, rendering such conditions crime-related. Specifically, Division Two of this court has reversed conditions requiring substance counseling and treatment when the evidence did not show substance use contributed to the crime.[92] Division Three of this court has held that conditions barring the defendant from possessing drug paraphernalia, otherwise not a crime, are improper when the crime was not drug-related.[93]

But a sentencing court may require that an offender submit to tests to monitor compliance with other valid conditions of community custody.[94]

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[89] Id.

[90] RCW 9.94A.505(9).

[91] RCW 9.94A.030(10).

[92] State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

[93] State v. Munoz-Rivera, 190 Wn. App. 870, 892, 361 P.3d 182 (2015).

[94] State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998).

Specifically, the supreme court has recognized the investigative utility of polygraph tests in monitoring general compliance with sentencing conditions.[95]

Here, conditions 5, 7, 8, and 9 require that Brown not possess drug paraphernalia, participate in certain substance counseling, treatment, and offender programs, and participate in urinalysis, Breathalyzer, and polygraph tests.

The trial court at his original sentencing expressly found that Brown's crimes were not drug-related and declined to impose the drug-related conditions. It made no contrary finding on resentencing. Thus, it abused its discretion in imposing conditions that required Brown not to possess drug paraphernalia and to participate in counseling, treatment, and offender programs. These conditions must be stricken.

The sentencing court also imposed a monitoring condition, requiring that Brown submit to urinalysis, Breathalyzer, and polygraph tests. Additionally, the trial court imposed conditions that Brown neither possess nor consume drugs or alcohol. Brown does not challenge these latter conditions. Thus, the trial court did not abuse its discretion in imposing urinalysis and Breathalyzer conditions to monitor compliance with these conditions. Nor did it abuse its discretion in imposing the polygraph condition, necessary to monitor compliance with a wider host of unchallenged conditions.

Brown additionally argues that collateral estoppel barred the trial court from reconsidering its decision that the crimes were not drug-related. We agree.

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[95] Id.

As we discussed, the issue of the standard sentencing range changed from initial sentencing to resentencing. But the issue of whether the crimes were sufficiently drug-related to justify imposition of these same conditions was identical at both proceedings. The State recommended the conditions at both. Thus, the issue is unchanged, and collateral estoppel barred the trial court's reconsideration.

Brown argues that the trial court could not impose community custody conditions as these exceeded the mandate on remand. Not so.

This court remanded Brown's case "with instructions that the trial court enter orders vacating these convictions and for resentencing."[96] The mandate stated that the case was remanded "for further proceedings in accordance with the attached true copy of the opinion." Imposition of community custody sentencing is a necessary part of sentencing, and thus was within the resentencing court's authority.

Drug Areas

Brown argues that condition number 6 requiring that he avoid "drug areas" as determined by his Community Corrections Officer (CCO) is unconstitutionally vague and overbroad. We agree.

Due process precludes the enforcement of vague laws, including sentencing conditions.[97] To avoid a vagueness challenge, the law "must (1) provide ordinary people fair warning of proscribed conduct, and (2) have

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[96] Brown, No. 70148-7-I, slip op. at *14.

[97] State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

standards that are definite enough to 'protect against arbitrary enforcement.'"[98] Failure to satisfy either prong renders the condition unconstitutional.[99] But a condition imposed upon community custody is not vague "'merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'"[100] This court does not presume sentencing conditions to be constitutionally sound.[101]

This court recently held, in State v. Irwin, that a community custody condition requiring further definition from a CCO was unconstitutionally vague.[102] That case concerned a community custody condition barring Samuel Irwin from places where "children are known to congregate," as defined by his CCO.[103] This court concluded that "[w]ithout some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to understand what conduct is proscribed."[104] The authority given to the

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[98] Id. at 652-53 (quoting State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008)).

[99] Id. at 653.

[100] Id. (quoting State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)).

[101] Id. at 652.

[102] 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

[103] Id. at 649.

[104] Id. at 655 (internal quotation marks omitted).

CCO to interpret the condition also allowed for unconstitutionally arbitrary enforcement.[105]

Here, the State concedes that this condition is unconstitutionally vague. The State's concession is proper. Leaving the definition of "drug areas" open to the CCO's discretion deprives Brown of fair warning and allows for arbitrary enforcement under Irwin. Further, the trial court held that a recommended condition that Brown "not associate with known drug users" was impermissibly vague. It is difficult to see how that condition is distinct from that challenged with regards to vagueness.

Brown also argues that this condition unconstitutionally infringes upon his fundamental right of travel. We need not reach this argument because the vagueness issue is dispositive.

Brown argues that the condition should be stricken. He contends that even if its vagueness were cured, it would not be crime-related. He cites precedent that this is the "'simple remedy.'"[106] The State contends that both striking and clarification are appropriate remedies.

We conclude that striking the condition is the proper remedy.

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[105] Id.

[106] Riles, 135 Wn.2d at 350.

We affirm the sentence, except for the community custody conditions that we have discussed. We reverse those conditions and remand to the trial court with directions to address them in a manner not inconsistent with this opinion.

Cox, J.

WE CONCUR:

Mann, J.

Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75458-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine
[sfine@snoco.org]
Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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