

NO. 65916-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Brian English,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Mr. English was convicted of possession of methamphetamine. At sentencing, the trial court ordered, as part of the community custody term, that Mr. English submit to Global Positioning System ("GPS") monitoring at the discretion of his Community Custody Officer. The court made no findings that the GPS monitoring was related to Mr. English's conviction for possession of a controlled substance. The condition should be stricken as not related to the crime for which the sentence was imposed.

B. ASSIGNMENT OF ERROR

The trial court erred when it imposed a community custody provision, GPS monitoring, unrelated to the crime of possession of a controlled substance. CP 18.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court's authority at sentencing is controlled by the Sentencing Reform Act (SRA). That statute authorizes the imposition of community custody conditions only if related to the crime for which the sentence is imposed. Unauthorized conditions of community custody must be stricken on review. Where Mr. English was sentenced for possession of a controlled substance

and the court imposed an unrelated condition, that defendant submit to GPS monitoring at the discretion of the Community Custody Officer, must that condition be stricken as not related to the crime?

D. STATEMENT OF THE CASE

Everett Police Officer Rodney Wolfington came upon Mr. English walking with an unidentified female just prior to receiving a dispatch that there was an outstanding warrant for Mr. English for failure to register. 2RP 41.¹ Officer Wolfington approached Mr. English, told him he was under arrest, and took him by the arm. 2RP 42-43, 1RP 30. Mr. English fled. 2RP 43. As Officer Wolfington pursued him, Mr. English dropped a backpack he had been carrying. 2RP 44, 50. Officer Wolfington lost sight of Mr. English briefly, but caught up with him. 2RP 50-53. Additional officers arrived at the scene and arrested Mr. English. 2RP 70; 3RP 36, 55.

Plastic baggies with methamphetamine were found subsequently along the route of Mr. English's flight. 2RP 60-61;

¹ The volumes of the verbatim reports of proceeding are referred to as follows in this brief: 1RP refers to the transcript from April 25, 2010, for which the title page is misdated as September 25, 2009; 2RP refers to the transcript from June 28, 2010; 3RP refers to the transcript from June 29, 2010; and 4RP refers to the transcript from July 20, 2010.

3RP 13-14. The police did not locate the dropped backpack. 2RP 59.

Mr. English was charged with possession of a controlled substance under RCW 69.50.4013 and 9.94A.525(19). CP 59. A jury found him guilty. CP 31. At sentencing, the court imposed a 12-month community custody period. CP 18. One of the conditions of community custody is that the Community Custody Officer (“CCO”) “may place a G.P.S. device on the defendant in his (CCO’s) discretion.” *Id.* The court made no findings that the condition was related to the crime. See 4RP 5 (in requesting condition, State ties it to sex offense), 15 (court’s ruling).

E. ARGUMENT

THE GPS-MONITORING COMMUNITY CUSTODY
CONDITION MUST BE STRICKEN BECAUSE IT IS
NOT RELATED TO THE CRIME OF POSSESSION
OF A CONTROLLED SUBSTANCE.

When an individual is convicted of a felony, the sentencing court must impose punishment only as authorized by the SRA. RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (a court only has sentencing authority as provided by the Legislature). A challenge to a sentence imposed without statutory authority, including the

conditions of community placement or custody, may be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). This court reviews de novo whether the SRA authorizes the trial court to impose a challenged condition. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Findings of fact underlying the imposition of a community custody condition are reviewed for substantial evidence. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), disapproved of on other grounds by State v. Valencia, -- Wn.2d --, 239 P.3d 1059 (Sept. 9, 2009).

1. In contravention of the Sentencing Reform Act, the condition of GPS monitoring is not related to Mr. English's conviction for possession of a controlled substance.

Under the SRA, the sentencing court may impose and enforce "crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8); Armendariz, 160 Wn.2d at 112. RCW 9.94A.030(10) defines the term "crime-related prohibition":

"Crime-related prohibition" means 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. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10) (emphasis added).

At sentencing, the trial court did not make a determination that the monitoring condition was related to the possession offense. Indeed, GPS monitoring bears no relation to the possession of a controlled substance. Though RCW 9.94A.704(5) allows the Department of Corrections to employ electronic monitoring for an offender sentenced pursuant to a sex offense, Mr. English was not convicted of a sex offense here.

In Jones, the defendant challenged the community custody conditions that ordered him to participate in alcohol counseling, in the absence of evidence alcohol contributed to his offense of burglary and other crimes. 118 Wn. App. at 207-08. Division Two of this Court stated, “[T]he SRA . . . has provided that a trial court, when imposing community custody for specified crimes . . . may order an offender to ‘participate in crime-related treatment or counseling services.’” Id. at 209. The court therefore held the alcohol counseling provision beyond the authority of the trial court: “Accordingly, we hold that alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending, and to the safety of the

community, **only if** the evidence shows that alcohol contributed to the offense.” Id. at 208 (emphasis added). Similarly, here, given the lack of evidence the condition was directly related to the circumstances of Mr. English’s offense, the condition was imposed without authority.

Notably, the Jones court did not find that the alcohol counseling condition was an “affirmative act[] necessary to monitor compliance” with the separate condition prohibiting that defendant from consuming alcohol. RCW 9.94A.030(10). The prohibition on alcohol consumption was not crime-related. Thus, while lawful on its own under the SRA, the alcohol consumption provision could not be used to bootstrap other non-crime-related affirmative acts, such as alcohol counseling. See Jones, 118 Wn. App. at 208. Unlike in State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), where polygraph and plethysmograph testing were proper community custody conditions for a defendant convicted of rape and ordered to participate in crime-related mental health counseling, here the GPS-monitoring provision is not related to the underlying crime of possession of methamphetamine and cannot be used to monitor otherwise authorized but not crime-related conditions. See also State v. Julian, 102 Wn. App. 296, 9 P.3d 851 (2000) (affirmative

monitoring condition of polygraph testing proper for sex offense sentencing). Mr. English's GPS-monitoring condition is like the alcohol counseling condition in Jones—unrelated to the criminal activity for which the sentence is imposed—and must be stricken.

2. The unauthorized condition must be stricken.

Where a court imposes conditions of community custody which are unauthorized by the SRA, the remedy is to strike those conditions. Jones, 118 Wn. App. at 212. The facts upon which the court could rely did not establish that the GPS-monitoring provision was crime-related. The unauthorized condition of community custody must be stricken.

F. CONCLUSION

Because it is not related to the crime for which the sentence was imposed, possession of a controlled substance, the community custody provision regarding GPS monitoring should be stricken.

DATED this 20th day of January, 2011.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	NO. 65916-2-I
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BRIAN ENGLISH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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