

66846-3

66846-3

NO. 66846-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY P. MILLER,

Appellant.

FILED
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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

1. Should the case be remanded for the trial court to strike a condition of community custody requiring the defendant pay crime related counseling and medical treatment for his victim when a restitution order for such items has been entered?

2. Does the court have authority to impose conditions of community custody requiring the defendant to a) not frequent establishments where alcohol is the chief commodity for sale; and b) participate in substance abuse treatment, where evidence showed that defendant's alcohol use related to the circumstances of the crime?

3. Should the case be remanded for the trial court to strike conditions of community custody requiring the defendant to a) not associate with known users and sellers of illegal drugs; b) stay out of specified drug areas; and c) not possess drug paraphernalia, imposed as affirmative conditions to enforce compliance with its order that defendant to not possess or consume controlled substances unless legally prescribed?

4. Does the court have authority to impose a condition of community custody requiring the defendant to submit to

plethysmograph examinations when the defendant has also been ordered to participate in sexual deviancy treatment?

II. STATEMENT OF THE CASE

On June 25, 2009, Gregory Miller was charged with the rape of K.W. CP 99-100. The rape occurred at K.W.'s Arlington, WA, apartment on September 2, 2008. Miller was an acquaintance of K.W. and was at her apartment collecting items that his wife had left at the apartment during a period of separation from Miller. While K.W. was gathering the items, Miller grabbed K.W. by the hair and forced her head into a doorframe. Miller then pushed K.W. into the bedroom and onto the bed. Miller got on top of K.W. and put his hands around her throat. K.W. struggled and told Miller to stop, but he continued. K.W. briefly got away from Miller, but he grabbed her again and pushed her face down onto the bed where he vaginally raped her. CP 97; RP 30-60.

K.W. went to the hospital where a sexual assault examination was performed. The police were called and Miller was located and arrested at his place of employment. As he was being arrested, Miller commented, "I knew this was going to happen." Miller denied any sort of sexual activity with K.W. The crime laboratory analyzed the swabs taken from K.W. during the sexual

assault examination and swabs taken from Miller. The vaginal swabs taken from K.W. contained DNA matching Miller's DNA. CP 97-98; RP 67-68, 137-146, 150-157, 217-238, 249, 256-260, 265-271.

The case proceeded to trial on November 12 – 18, 2010, on the amended charge of second degree rape. CP 95-96; RP volumes I-V. The jury found Miller guilty as charged. CP 51. Miller was sentenced to a standard range indeterminate sentence with a minimum of 90 months and a maximum of life. Miller was sentenced to community custody for life. CP 17–31. The court imposed several conditions of community custody including the sixteen conditions contained in Appendix A to the Judgment and Sentence. CP 30. In his appeal Miller challenges seven of those conditions.

III. ARGUMENT

A. STANDARD OF REVIEW.

A court may impose a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). A defendant always has standing to challenge his sentence on grounds of illegality. State v. Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). An illegal or erroneous sentence may be challenged for the

first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The court reviews whether the trial court had statutory authority to impose community custody conditions *de novo*. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The imposition of crime-related prohibitions is reviewed for abuse of discretion. Armendariz, 160 Wn.2d at 110.

B. COMMUNITY CUSTODY CONDITIONS.

Miller was sentenced pursuant to former RCW 9.94A.712¹ to an indeterminate sentence of 90 months to life. Miller's sentence included community custody for the maximum term of life. Since Miller's community custody was ordered pursuant to former RCW 9.94A.712, the court had authority to impose conditions of community custody set out in RCW 9.94A.700(4) and (5) and to "order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, ..." Former RCW 9.94A.712(6)(a)(i). The court also had authority to impose and enforce affirmative conditions as part of the sentence. Former RCW 9.94A.505(8).

¹ Recodified as RCW 9.94A.507 by Laws of 2008, ch. 231 §56, effective August 1, 2009. Former RCW 9.94A.712 applies to the defendant because his offense was committed prior to the effective date.

The court imposed several conditions of community custody. CP 20-22, 30. Miller challenges seven of the conditions set forth in Appendix A (conditions 2, 4, 6, 7, 8, 12, 13). Appellant's Brief 1.

1. Costs Of Crime Related Counseling And Medical Treatment.

Miller challenges the conditions of community custody requiring him to pay for crime related counseling and medical treatment for K.W. CP 30 (condition 2). Appellant's Brief 11.

Under an indeterminate sentence the superior court may require the defendant to make restitution payments to any person who may have suffered loss or damage by reason of the commission of the crime. RCW 9.95.210(2). Restitution is generally recognized as a valid condition of probation. State v. Bedker, 35 Wn. App. 490, 492, 667 P.2d 1113 (1983), *overruled on other grounds* State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994).

Payment of the cost of crime related counseling and medical treatment can be ordered as restitution pursuant to a criminal conviction. RCW 9.94A.735(3). The court can determine the amount of restitution at sentencing or within one hundred eighty days. RCW 9.94A.750. Further, the court may modify the amount, terms and conditions of restitution for up to twenty-years. RCW 9.94A.750(4). In the present case, at sentencing, contemporaneous

with the entry of the Judgment and Sentence, the court entered a separate Restitution Order for \$346.37 to recover the cost of the victim's medical examination paid by the crime victim's compensation program. CP 32-33; RP 2/22/11 Sentencing 7. Additionally, the Judgment and Sentence specifically noted that the legal financial obligations therein did not include all restitution which may be set by later order of the court. CP 23. It was not an abuse of discretion for the court to require Miller to pay for the cost of crime related medical treatment as a condition of his community custody.

Taken as a whole, the language of Miller's judgment and sentence, impliedly limits the condition of payment for the cost of crime related counseling and medical treatment to such costs ordered by the court. A challenge to this condition can best be resolved as applied if and when Miller is accused of violating this condition. State v. Riles, 86 Wn. App. 10, 18, 936 P.2d 11 (1997). Thus it is not necessary to remand the case to the trial court to strike this condition.

2. Frequenting Establishments Where Alcohol Is The Chief Commodity For Sale And Participating In Substance Abuse Treatment.

The court ordered that Miller “not possess or consume alcohol and not frequent establishments where alcohol is the chief commodity for sale. CP 30 (condition 4). Miller only challenges the portion of the condition that he not frequent establishments where alcohol is the chief commodity for sale, acknowledging that the court had authority to prohibit his possession or consumption of alcohol. Brief of Appellant 6; see former RCW 9.94A.700(5)(d). The court also ordered Miller to participate in substance abuse treatment as directed by the supervising Community Corrections Officer. CP 30 (condition 12). Miller argues that these conditions are not crime related. Appellant’s Brief 6, 10.

The court may order an offender to participate in crime-related treatment or counseling services as a condition of community custody. Former RCW 9.94A.700(5)(c). A crime related prohibition is an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10)². Miller testified that his first physical contact of a sexual nature with K.W. occurred

² Formerly RCW 9.94A.030(13).

when he was drunk; four days before the rape. Miller was at a party drinking with K.W. and her fiancé, Anthony; the three of them went to K.W.'s apartment. They were all "a little drunk." Around midnight, Miller and K.W. were on the porch smoking while Anthony was inside cooking; Miller, unprovoked, started kissing K.W. RP 389-390. Four days later Miller raped K.W. in the bedroom of her apartment while her two young sons were downstairs in the living room. RP 46-60, 360-361, 365-369, 401. This evidence is sufficient to show that Miller's alcohol use related to the circumstances of the crime. The court did not abuse its discretion by imposing these conditions of community custody.

Additionally, the court has authority to impose and enforce affirmative conditions. Former RCW 9.94A.505(8); former RCW 9.94A.712(6)(a)(i). Since the court properly imposed the condition that Miller not possess or consume alcohol, it was reasonable for the court to impose the affirmative condition that Miller not frequent establishments where alcohol is the chief commodity for sale to aid his compliance in not possessing or consuming alcohol. The court did not abuse its discretion by imposing the condition of community custody.

3. Associating With Known Users Or Sellers Of Illegal Drugs, Staying Out Of Drug Areas And Possessing Drug Paraphernalia.

Miller challenges the conditions that he not associate with known users or seller of illegal drugs, that he stay out of drug areas defined in writing by the supervising Community Corrections Officer, and that he not possess drug paraphernalia. CP 30 (conditions 6, 7, 8). Miller does not challenge the condition that he not possess or consume controlled substances unless legally prescribed. CP 30 (condition 5); Appellant's Brief 8-10; see Former RCW 9.94A.700(4)(c).

Miller argues that the conditions that he not associate with known users and seller of illegal drugs and stay out of specified drug areas infringe upon his constitutional right of freedom to associate with others. Appellant's Brief 8. Miller does not cite authority to support his argument that the constitution protects a right to associate with known users and sellers of illegal drugs. Appellate courts do not address arguments that are not supported by cited authorities. RAP 10.3(a)(6); In re Marriage of Fiorito, 112 Wn. App. 657, 669, 50 P.3d 298 (2002).

Miller additionally argues that these conditions are not justified as a crime related prohibition. A crime related prohibition is

an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There was no evidence that Miller used drugs to perpetrate his crime, or that drug use related to the circumstances of his crime. However, the Court does have authority to order the defendant remain within or outside of certain specified geographical areas. Former RCW 9.94A.700(5)(a); State v. White, 76 Wn. App. 801, 811, 888 P.2d 169 (1995), affirmed, 129 Wn.2d 105, 915 P.2d 1099 (1996). Drug areas defined in writing by the supervising Community Corrections Officer are specified geographic areas. Therefore, the conditions are permissible.

Miller also challenges the condition that he not possess drug paraphernalia. CP 30 (condition 7); Appellant's Brief 8. Miller does not challenge the condition that he obey all municipal, county, state, tribal and federal laws. CP 30 (condition 3). Use of drug paraphernalia and possession with intent to use drug paraphernalia are offenses under many municipal, county, state, tribal and federal laws. See e.g. RCW 69.50.412. It was reasonable for the court to impose the affirmative condition that Miller not possess drug paraphernalia to aid his compliance with the order that he obey all municipal, county, state, tribal and federal laws.

Additionally, since the condition that Miller not possess or consume illegal controlled substance is authorized by statute and the court is authorized to impose affirmative conditions, it logically follows that the court can lawfully require that Miller not associate with known users and seller of illegal drugs, stay out of specified drug areas, and not possess drug paraphernalia to aid his compliance in not possessing or consuming illegal controlled substances. Former RCW 9.94A.505(8); former RCW 9.94A.712(6)(a)(i); In re Price, 157 Wn. App. 889, 908, 240 P.3d 188 (2010). A challenge to these conditions can best be resolved as applied if and when Miller is accused of violating any of the conditions. State v. Riles, 86 Wn. App. 10, 18, 936 P.2d 11 (1997). Thus it is not necessary to remand the case to the trial court to strike this condition.

4. Participate In Urinalysis, Breathalyzer, Polygraph And Plethysmograph Examinations.

The trial court additionally ordered Miller to “participate in urinalysis, Breathalyzer, polygraph and plethysmograph examinations as directed by the supervising Community Corrections Officer.” CP 30 (condition 13). Miller only challenges the portion of this condition that requires him to participate in

plethysmograph examinations as directed by the supervising Community Corrections Officer. Appellant's Brief 12-14. Miller does not challenge the condition that requires sex offender treatment:

Participate in a sexual deviancy evaluation and comply w[ith] any/all recommended treatment with a certified provider and make progress in any recommended course of treatment. Follow all conditions outlined in your treatment contract. Do not change therapists without advanced permission of the Indeterminate Sentence Review Board.

CP 30 (condition 10).

Plethysmograph testing may be ordered to monitor an offender's compliance with sex offender treatment. State v. Riles, 135 Wn.2d 326, 344-45, 957 P.2d 655 (1998), *abrogated on other grounds*, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Because sex offender treatment was ordered the trial court had authority to order Miller to participate in plethysmograph examinations. Id.

Nonetheless, Miller argues the plethysmograph condition is improper because it violates his right to be free from bodily intrusions, which he states is protected by the Fourth and Fourteenth Amendment. Many of the cases cited by Miller are not

determinative of this question because they deal with persons who had not been convicted of a crime.

Sell v. United States, 539 US 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) addressed the question: Whether the forced administration of antipsychotic drugs to render the charged defendant competent to stand trial unconstitutionally deprive him of his "liberty" to reject medical treatment?

Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) addressed the use of two capsules containing morphine to obtain the defendant's conviction for illegal possession of morphine. The capsules were obtained without a search warrant, at a hospital by a physician, under the direction of a deputy sheriff, to force an emetic solution through a tube into the accused's stomach against his will; this 'stomach pumping' produced vomiting, and in the vomited matter were found the two capsules containing morphine. The court found this violated the Due Process Clause of Fourteenth Amendment.

Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007), addressed the issue of conditions of pre-trial release. Butler was charged with DUI; the trial court released Butler on his own recognizance, but as conditions of his release required Butler to

obtain an alcohol evaluation and treatment and attend self-help group meetings. The court reversed, finding that these conditions amounted to post-conviction penalties that are not permitted on pretrial release.

In re Marriage of Parker, 91 Wn. App. 219, 957 P.2d 256 (1998), the court vacated and remanded the lower court's order that the husband in a dissolution proceeding submit to penile plethysmograph tests of sexual deviancy.

The Fifth Circuit Court of Appeals considered an offender's Due Process rights in connection with sentencing conditions in Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004), cert denied, 546 U.S. 938, 126 S.Ct. 427, 163 L.Ed.2d 325 (2005). The Court stated that an offender's liberty interest may be circumscribed when he has been convicted of a crime. Dretke, 395 F.3d at 221. The court held that because Coleman not been convicted of a sex offense he had a liberty interest in freedom from sex offender classification; that the sex offender conditions were such a "dramatic departure" from normal conditions imposed in non-sex offense cases, Coleman was entitled to procedural protections before such conditions could be imposed. Dretke, 395 F.3d at 222.

Here Miller was convicted of a sex offense. Sexual deviancy treatment and the mechanisms used to accomplish that treatment are not a dramatic departure from the normal conditions imposed on sex offenders. “Plethysmograph testing is regarded as an effective method for diagnosing and treating sex offenders.” Riles, 135 Wn.2d at 343-344 (citing cases where courts in this and other jurisdictions have authorized plethysmograph tests incident to treatment programs for sex offenders); United States v. Weber, 451 F.3d 552, 555 (9th Cir. 2006) (plethysmograph testing has been recognized by psychologists and researchers as a useful technique in the treatment of sexual offenders.)

Miller nevertheless argues that since the condition is imposed at the direction of his community corrections officer, and not a therapist, it could be ordered as a monitoring device, as prohibited by the Court in Riles, rather than as part of treatment. Miller argues that the mere possibility it could be ordered as a monitoring device, means the condition is improper. Appellant's Brief 14.

Community custody conditions should not be read in isolation; rather they should be read as a whole. State v. Combs, 102 Wn. App. 949, 952-953, 10 P.2d 1101 (2000). Condition 13

immediately follows conditions directing Miller to participate in a sexual deviancy evaluation and comply with any recommended treatment; participate in offense related counseling programs; and participate in substance abuse treatment. CP 30 (conditions 10, 11, 12). Condition 13 sets forth several conditions relating to these prior conditions. Read together and in light of the Court's holding in Riles, it is clear that the Community Corrections Officer's authority to direct plethysmograph examinations is limited to ordering it in the context of sexual deviancy treatment. Combs, 102 Wn. App. at 952-953. The condition is valid. Riles, 135 Wn.2d at 345.

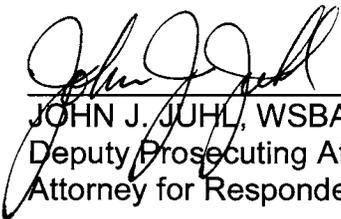
If the Community Custody Officer orders testing for an impermissible purpose, Miller can challenge the order as applied at that time. State v. Riles, 86 Wn. App. at 18. It is not necessary to remand the case to the trial court to strike this condition.

IV. CONCLUSION

For the forgoing reasons the State requests that the Court affirm the conditions of community custody.

Respectfully submitted on October 24, 2011.

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 26th day of October, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
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SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 21st day of October, 2011.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is stylized and includes a long horizontal flourish extending to the right.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit