

FILED

April 17, 2015

Court of Appeals

Division I

COA NO. 71756-1-I

State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ELMER VILLAFUERTE,

Appellant.

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

The Honorable Barbara Linde, Judge

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REPLY BRIEF OF APPELLANT

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A. **ARGUMENT IN REPLY**

1. **THE PROSECUTOR IMPERMISSIBLY COMMENTED ON VILLAFUERTE'S EXERCISE OF CONSTITUTIONALLY PROTECTED RIGHT TO PRE-ARREST SILENCE.**

Villafuerte rests on the argument made in the opening brief.

2. **PROSECUTORIAL MISCONDUCT VIOLATED VILLAFUERTE'S DUE PROCESS RIGHT TO A FAIR TRIAL.**

The State claims there is no misconduct because the trial prosecutor merely responded to what defense counsel argued. Brief of Respondent (BOR) at 37, 40. But defense counsel at no time told the jury that its job was to determine what happened that day. Indeed, defense counsel expressly told the jury it did not need to solve the case. RP 483-84. Defense counsel did not distort the jury's role. The prosecutor did: "Your decision, your job is to figure out what happened here." RP 494. A prosecutor cannot "miscast the jurors' role as one of determining what happened" as opposed to determining whether the State had met its burden of proof. State v. Evans, 163 Wn. App. 635, 645, 260 P.3d 934 (2011). Defense counsel was right to object, and the trial court was wrong to overrule that objection.

The State's attempt to spin away this plain misconduct by seeking to wrap it up in "context" is not well taken. The context is that the

prosecutor sought a guilty verdict from the jury by improperly directing them to do a job they have no business doing. A jury's job is hard enough without the trial prosecutor perverting what that job is.

**3. THE COURT'S ORDER NOT TO CONSUME ANY "NON-PRESCRIBED DRUGS" AS A CONDITION OF COMMUNITY CUSTODY IS UNAUTHORIZED BY STATUTE.**

The State claims Villafuerte's community custody challenge is not ripe for review because he has not been charged with violating it. BOR at 45-46. Established law holds otherwise. "A challenger does not need to demonstrate that the condition has been enforced; a pre-enforcement challenge is ripe for review." State v. Johnson, 184 Wn. App. 777, 779, 340 P.3d 230 (2014). "Courts routinely entertain pre-enforcement challenges to sentencing conditions." State v. McWilliams, 177 Wn. App. 139, 153, 311 P.3d 584 (2013), review denied, 179 Wn.2d 1020, 318 P.3d 279 (2014). The State cites State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) in support of its contrary claim, but the Supreme Court in State v. Sanchez Valencia, 169 Wn.2d 782, 790-91, 239 P.3d 1059 (2010) expressly disapproved of Motter on this very point.

"Pre-enforcement challenges to community custody conditions are ripe for review when the issue raised is primarily legal, further factual development is not required, and the challenged action is final."

McWilliams, 177 Wn. App. at 153 (citing Sanchez Valencia, 169 Wn.2d at 789). The community custody challenge in Villafuerte's case is ripe. The issue is primarily legal: does the sentencing court have the statutory authority to impose the condition that Villafuerte not consume any non-prescribed drugs? If the condition is not authorized by statute, time will not cure the problem. The condition was unauthorized when it was first imposed as part of the sentence and it remains just as unauthorized today. Second, this question is not fact-dependant. Either the condition as written is grounded in statutory authority or it is not. The issue does not require further factual development because this statutory question does not depend on the particular circumstances of the attempted enforcement. Third, the challenged condition is final because Villafuerte has been sentenced under the condition at issue. Sanchez Valencia, 169 Wn.2d at 789 (applying the three factors to a vagueness claim).

Reviewing courts must also consider the hardship to the parties of withholding consideration. Id. at 786. "[T]he fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship." State v. Bahl, 164 Wn.2d 739, 747, 193 P.3d 678 (2008) (quoting United States v. Loy, 237 F.3d 251, 257 (3d Cir. 2001)). Preenforcement review thus "helps prevent hardship on the defendant, who otherwise must wait until he or she is charged with

violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis." Bahl, 164 Wn.2d at 751. The hardship consideration applies with special force in Villafuerte's case, where he is left to wonder whether he will be arrested and jailed for consuming any non-controlled substance without a prescription.

There is no dispute that the record lacks substantial evidence that Villafuerte used or suffered from the effects of a non-prescribed drug on the day in question. But the State contends the trial court, in its oral ruling at the sentencing hearing, intended "non-prescribed drugs" to mean "controlled substances" and therefore the condition is authorized. BOR at 43.

If those two terms meant the same thing, then there would have been no need for the court to prohibit both controlled substances and non-prescribed drugs in the judgment and sentence. CP 84. Courts do not typically engage in needlessly redundant judicial acts. Different language signals the court meant different things. An ordinary person, faced with interpreting the two conditions, would quite reasonably infer that the "non-prescribed drug" prohibition encompasses drugs that are not covered by the controlled substance prohibition. If the two conditions only covered

the same kinds of drugs (i.e., illegal drugs), then there would be no reason to list two separate conditions.

The prohibition on consumption of controlled substances is a boilerplate condition in many judgment and sentences, as it was here. When a judge handwrites in the additional condition to not consume non-prescribed drugs, the reasonable inference is that the two terms mean something different because the judge made the extra effort to specify something is prohibited beyond the boilerplate condition.

At sentencing, the court orally ordered Villafuerte to "not consume or use any non-prescribed drugs or controlled substances." RP 626-27. Again, if the court simply meant controlled substances, the court could have just said so and left out any reference to non-prescribed drugs.

Moreover, the court's order is written in absolute terms: "The defendant shall not consume *any* alcohol or non-prescribed drugs." CP 84 (emphasis added). "Any" means "one, no matter what one: EVERY . . . without restriction or limitation in choice." State v. Acrey, 135 Wn. App. 938, 943, 146 P.3d 1215 (2006) (quoting Webster's Third New Int'l Dictionary 97 (3d ed. 1993)). That is the plain and ordinary meaning of the word. State v. Marohl, 170 Wn.2d 691, 699, 246 P.3d 177 (2010) (dictionaries provide plain and ordinary meanings of terms). There is no

limitation on the kind of non-prescribed drugs that are prohibited under the plain language of the court's order.

Further, a sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). Consistent with this mandate, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926).

The condition prohibiting non-prescribed drugs is not definite and certain that only controlled substances are prohibited. Read literally, the prohibition covers more than illegal drugs. The community corrections officer is the one tasked with enforcing the conditions of community custody. The community corrections officer is not a mind reader. It is fanciful to assume the community corrections officer will be rifling through the sentencing hearing transcript to figure out what the trial court really intended. If the non-prescribed drug condition is left to stand as part of the judgment and sentence, the community corrections officer ultimately tasked with abiding by the judgment and sentence will be laboring under a misapprehension of what is required of Villafuerte. This Court should vacate the improper condition pertaining to "non-prescribed

drugs," which will have the felicitous effect of removing an unauthorized condition as well as any uncertainty surrounding it.

**4. THE COURT FAILED TO FOLLOW STATUTORY REQUIREMENTS IN IMPOSING SUBSTANCE ABUSE TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.**

The State concedes that, at minimum, the court erred in ordering substance abuse treatment because only alcohol contributed to the offense, and asks that this Court remand the matter for imposition of "alcohol abuse treatment." BOR at 50. This is the alternative remedy that Villafuerte's requested in the opening brief in the event this Court determines the chemical dependency finding is supported by substantial evidence and that such treatment can be imposed without a chemical dependency screening report.

That being said, the State's argument that substantial evidence supports the chemical dependency finding and that the court followed statutory authority in the absence of a screening report is flawed.

RCW 9.94A.500(1) provides "*Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit*

such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense." (emphasis added).

The language of the statute is plain. The chemical dependency screening report is a prerequisite to imposition of chemical dependency treatment unless such report is "specifically waived by the court."

Yet the State argues the court specifically waived the report requirement by silently failing to order the report, citing Division Three's decision in State v. Guerrero, 163 Wn. App. 773, 261 P.3d 197 (2011), review denied, 173 Wn.2d 1018, 272 P.3d 247 (2012). BOR at 48.

Guerrero is flat out wrong to the extent it concludes a trial court "specifically waives" the report by simply failing to order one. Guerrero, 163 Wn. App. at 778. When interpreting the meaning of statutes, "we must derive our understanding of the legislature's intent from the plain language before us, especially in matters of criminal sentencing." State v. Delgado, 148 Wn.2d 723, 730, 63 P.3d 792 (2003). Courts must assume the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. Delgado, 148 Wn.2d at 727. Division Three, in essentially equating an unexpressed, non-specific waiver with a specific waiver, ignores the plain language of the statute. Specific waivers occur on the record. That is what makes them specific.

Division Three, however, reads the phrase "specific waiver" right out of the statute. "[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous." Jongeward v. BNSF R. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012). Every word of a statute must be given significance. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Division One is not bound by Division Three's decision and it should not be followed because it violates basic canons of statutory construction. See McClarty v. Totem Elec., 119 Wn. App. 453, 469, 81 P.3d 901 (2003) (the decision of a division is not binding on another division), rev'd on other grounds, 157 Wn.2d 214, 137 P.3d 844, (2006); State v. Schmitt, 124 Wn. App. 662, 669 n.11, 102 P.3d 856 (2004) ("We need not follow the decisions of other divisions of this court.").

Indeed, Division Three expressed discomfort with its own reading of the statute: "To the extent this reading can be criticized as distorting the concept of a specific waiver, then we agree with the State that the later-adopted and more specific language of RCW 9.94A.660 controls." Guerrero, 163 Wn. App. at 778. That alternative ground for deciding the case was sound: "A general statutory provision must yield to a more specific statutory provision." Ass'n of Wash. Spirits & Wine Distributors

v. Wash. State Liquor Control Bd., 182 Wn.2d 342, 340 P.3d 849, 856 (2015).

The issue in Guerrero was whether the trial court erred in failing to order a chemical dependency screening report as required by RCW 9.94A.500(1) before declining a DOSA request. Guerrero, 163 Wn. App. at 776. The DOSA statute specified the court, in considering a residential chemical dependency treatment-based DOSA request, "*may* order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500." Id. at 777 (citing former RCW 9.94A.660 (Laws of 2009, ch. 389, § 2)). Under RCW 9.94A.500(1), meanwhile, "the court *shall* order" the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of an enumerated crime. Faced with a specific DOSA statute that did not require the report and a general statute that did, the specific statute controlled in the context of a DOSA sentencing request. That makes sense.

But here, there is no counterpart to the specific DOSA statute at issue in Guerrero that controlled over the mandatory language in RCW 9.94A.500(1). In the context of an ordinary, non-alternative sentencing case, the only statute that specifically addresses whether a report is needed is RCW 9.94A.500(1). Unlike the DOSA statute in Guerrero, RCW

9.94A.607(1), the general statute authorizing chemical dependency treatment, does not make the report discretionary. RCW 9.94A.607(1) does not address the issue at all. There is therefore no conflict between RCW 9.94A.607(1) and RCW 9.94A.500(1) and it is easy to harmonize them by holding the report requirement enunciated in RCW 9.94A.500(1) applies when the court seeks to impose chemical dependency treatment under RCW 9.94A.607(1). The trial court did not specifically waive the report in Villafuerte's case before imposing the treatment condition. In the absence of specific waiver, the court lacked statutory authority to impose treatment without first obtaining the report.

The State also contends that substantial evidence supports the trial court's boilerplate chemical dependency finding, citing Division Two's decision in State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), rev'd on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009). BOR at 49. In that case, Division Two remarked the trial court correctly imposed substance abuse treatment as a community custody condition despite the lack of a finding as required by RCW 9.94A.607(1) because the trial evidence showed the defendant consumed methamphetamine before committing the offense and the defendant asked the court to impose substance abuse treatment. Powell, 139 Wn. App. at 819-20.

Division Two's remarks in Powell are dicta because it had already decided to reverse conviction on a separate issue when it addressed the viability of the community custody condition. See State v. C.G., 114 Wn. App. 101, 107-08, 55 P.3d 1204 (2002) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta), aff'd, 150 Wn.2d 604, 80 P.3d 594 (2003); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dep't, 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Even so, Powell's reasoning withers under common sense scrutiny. Is everyone who commits a crime under the influence of alcohol an alcoholic? Is everyone who commits a crime while under the influence of drugs a drug addict? The answer is plainly "no." That cannot be reasonably disputed. The statutory term "chemical dependency" must mean something more than simply being under the temporary influence of a substance. In this regard, the State criticizes Villafuerte's citation to "substance dependence" in the DSM but offers no alternative definition. BOR at 49. We can also look to the dictionary for the ordinary meaning of these words, which is consistent with the cited DSM definition. See State v. Beer, 93 Wn. App. 539, 543, 969 P.2d 506 (1999) ("when terms in

a statute are not defined, courts consider the terms according to their ordinary meaning which may be determined by reference to extrinsic aids such as dictionaries.").

"Chemical" means "a substance (as an acid, alkali, salt, synthetic organic compound) obtained by a chemical process, prepared for use in chemical manufacture, or used for producing a chemical effect." Webster's Third New Int'l Dictionary 384 (1993). Of the different meanings of "dependency," the one that fits with this context is "something that is dependent or in dependence upon something else." Id. at 604. "Dependent" means "unable to exist, sustain oneself, or act suitably or normally without the assistance or direction of another or others." Id.

The evidence in this case is that Villafuerte, on one occasion, had too much alcohol too drink. RP 299-300. There is no evidence that he was dependent on alcohol — no evidence that he is unable to exist, sustain himself, or act suitably or normally without the assistance of alcohol. The trial court's boilerplate, checked box finding that Villafuerte has a chemical dependency is not supported by substantial evidence. CP 84. And in the absence of a supported finding, chemical dependency treatment cannot be imposed. RCW 9.94A.607(1); Motter, 139 Wn. App. at 801

(factual findings made by a sentencing court must be supported by substantial evidence in the record).

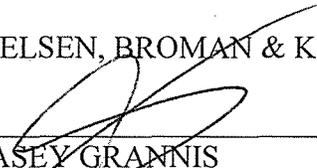
**B. CONCLUSION**

For the reasons set forth above and in the opening brief, Villafuerte requests reversal of the conviction. If the Court declines to reverse, then the erroneous community custody conditions should be stricken or fixed.

DATED this 17 day of April 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 71756-1-I
	)	
ELMER VILLAFUERTE,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17<sup>TH</sup> DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE REPLY BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] ELMER VILLAFUERTE  
411 ALDER LANE, APT. 202  
KENT, WA 98030

SIGNED IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF APRIL 2015.

X Patrick Mayovsky