

72942-0

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June 22, 2015
Court of Appeals
Division I
State of Washington

72942-0

NO. 72942-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BURKE,

Appellant.

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

The Honorable Millie Judge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in imposing a condition of community custody that requires appellant be directly supervised at all times when at work.

Issue Pertaining to Assignment of Error

Appellant was convicted of child molestation. The sentencing court imposed a condition of community custody requiring that he hold employment only in a position where he is always directly supervised. Where employment was in no way connected with the offenses and other conditions preclude employment involving contact with minors, did the sentencing court exceed its authority by imposing a condition unrelated to the crime?

B. STATEMENT OF THE CASE

The Snohomish County prosecutor charged appellant James Burke with one count of first-degree child molestation and two counts of second-degree child molestation. CP 94-95. Burke pled guilty and agreed the court could consider the affidavit of probable cause in imposing sentence. CP 81, 85.

According to the probable cause affidavit, Burke's 13-year-old step-granddaughter told police he began touching her breasts and vagina while she was in bed at night when she was seven years old. CP 98. She told police this occurred approximately three to four times per year for

five years. CP 98. L.F., a friend of Burke's step-granddaughter told police he slid his hand up her leg and squeezed her buttocks for about ten seconds while she was in bed spending the night at their home. CP 97.

Denying Burke's request for a special sex offender sentencing alternative, the court imposed an indeterminate sentence with a minimum of 98 months (the low end of the standard range) and a maximum term of life, the statutory maximum for first degree child molestation. CP 5. The court imposed community custody for the maximum term on count I, which is life. CP 6-7. As an additional condition of community custody, the court ordered, "Hold employment only in a position where you always receive direct supervision." CP 16. Notice of appeal was timely filed. CP 1.

C. ARGUMENT

THE COURT EXCEEDED ITS AUTHORITY BY IMPOSING A CONDITION OF COMMUNITY CUSTODY THAT RESTRICTS BURKE'S EMPLOYMENT POSSIBILITIES IN WAYS UNRELATED TO THE OFFENSE.

As a condition of Burke's community custody, the Court ordered that he "Hold employment only in a position where you always receive direct supervision." CP 16 (Additional Conditions of Community Custody, no. 10). This condition must be stricken because it is unrelated to the offense to which Burke pled guilty.

A trial court may impose only a sentence that is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Because it is solely the legislature's province to fix legal punishments, community custody conditions must be authorized by the legislature. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007)).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose "crime-related prohibitions" as a condition of a sentence. RCW 9.94A.703(3)(f). The court's decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). But "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Armendariz, 160 Wash.2d 106, 110, 156 P.3d 201 (2007); State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

A crime-related prohibition "prohibits conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10); State v. Motter, 139 Wn. App. 797, 802, 162 P.3d

1190 (2007), overruled on other grounds, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). In general, conditions that do not reasonably relate to the circumstances of the crime are unlawful unless specifically permitted by statute. State v. Jones, 118 Wn.App. 199, 205, 76 P.3d 258 (2003). Substantial evidence must support a determination that a condition is crime-related. Motter, 139 Wn. App. at 801.

Here, there is no evidence linking the challenged employment condition to the circumstances of the offense. Burke pled guilty to molesting his step-granddaughter and her friend while in his own home at night. CP 81. The court imposed numerous conditions relating to sex offender treatment and restricting Burke's contact with minors. However, a condition requiring him to be supervised at all times while at work is unrelated to the offense.

These offenses were not committed while he was at work, supervised or otherwise. Other conditions already prohibit any employment that would bring Burke into contact with minors. CP 16 (Additional Conditions of Community Custody no. 5 "Do not seek employment or volunteer positions, which place you in contact with or control over minor children."). Direct supervision while engaged in work that does not bring him in contact with minors is unrelated to his conviction for child-molestation. No evidence was presented at sentencing that would justify this condition.

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). “When a sentence has been imposed for which there is no authority in law, the trial court has the Power and the duty to correct the erroneous sentence, when the error is discovered.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P. 2d 848 (1955)). Because the community custody condition requiring Burke to be supervised at all times when at work is not authorized by statute, the condition must be stricken.

D. CONCLUSION

For the foregoing reasons, Burke requests this Court order the trial court to remove the unauthorized condition of community custody.

DATED this 22nd day of June, 2015.

Respectfully submitted,

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STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72942-0-1
)	
JAMES BURKE,)	
)	
Appellant.)	

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 22ND DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES BURKE
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MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JUNE 2015.

x Patrick Mayovsky