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Court of Appeals
Division I
State of Washington

No. 73112-2-I

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

STATE OF WASHINGTON, Respondent,

vs.

ALVARO BALDERAS-LOPEZ, Appellant.

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the reasonable doubt instruction given in this case pursuant to WPIC 4.01 is reviewable for the first time on appeal when Balderas -Lopez did not object and cannot demonstrate the instruction is unconstitutional.
2. Whether the trial court should remand this matter for consideration of Balderas-Lopez ability to pay discretionary legal financial obligations when Balderas-Lopez did not object to the imposition of these fines and the state has taken no efforts to enforce or collect those fees.
3. Whether Balderas-Lopez attorney was constitutionally ineffective by failing to object to the imposition of discretionary financial legal obligations where there is minimal record to determine if his attorney's decision was deficient and Banderas-Lopez has suffered no prejudice because the state is not seeking to enforce or collect the challenged fees.
4. Whether the community custody provision requiring plethysmograph examination at the 'direction of the department of correction and therapist' should be modified to clarify this condition may only be required as part of ordered sexual deviancy evaluation or treatment.
5. Whether the community custody provision prohibiting Banderas-Lopez from dating or engaging in sexual activity without prior approval from your community custody corrections officer or therapist is a reasonable crime related condition to be used to protect the community from similar acts of criminal behavior in the future.
6. Whether the community custody provision requiring Banderas-Lopez to 'not withhold information or keep secrets from treatment provider or community corrections officer should be stricken as being unconstitutionally vague.

7. Whether the community custody provision prohibiting use or possession of 'sexually explicit material' must be stricken because it is not crime related and implicates Balderas-Lopez' First Amendment rights.

B. FACTS

Alvaro Balderas-Lopez was charged and convicted of rape in the second degree. CP 6-7, 34. The jury also returned a special verdict finding the rape occurred when the complaining witness was incapable of consent by reason of being physically helpless or mentally incapacitated. Balderas-Lopez was given an indeterminate sentence of 102 months to life imprisonment and a term of community custody. CP 35, 46-61. The court also imposed standard mandatory and discretionary fines without objection from Balderas-Lopez.

Balderas-Lopez timely appeals complaining the standard reasonable doubt instruction, WPIC 4.01 is constitutionally defective, the imposition of discretionary court costs was done without consideration of his ability to pay and, he complains for the first time on appeal, several of the community custody conditions should be stricken. CP 62-78, Br. of App. at 1-2.

C. ARGUMENT

1. The trial court did not err giving the standard WPIC 4.01 instruction defining ‘reasonable doubt’ to the jury.

Banderas-Lopez contends the trial court erred giving the standard pattern jury instruction defining ‘reasonable doubt.’ See, WPIC 4.01, CP 14-33. Banderas-Lopez did not object to this instruction below.

Therefore, it is his burden to demonstrate that the reasonable doubt instruction given in this case, predicated on approved WPIC 4.01 that defines reasonable doubt for the jury constitutes a ‘manifest error affecting a constitutional right.’ RAP 2.5(a)(3). Banderas Lopez cannot meet this burden because this pattern reasonable doubt instruction has been mandated for use by our Supreme Court and was recently reaffirmed as meeting constitutional muster in State v. Kalebaugh, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015). Banderas-Lopez argument should be rejected.

Typically, trial courts have discretion to decide how best to word jury instructions. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988).

With respect to the reasonable doubt instruction however, our state Supreme Court has held the recommended WPIC pattern ‘reasonable doubt’ jury instruction shall be given as worded without change or alteration. State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). In Bennett, the Supreme Court acknowledged that it might be

tempting for trial courts to expand or alter the definition of reasonable doubt but that any effort to change the standard jury instruction imposes inherent risks of shifting the emphasis or use of the instruction. The court consequently held the standard recommended WPIC 4.01 instruction should be given without alteration in all cases.

Recently, in State v. Kalebaugh, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015), our State Supreme Court reaffirmed Bennett's holding concluding WPIC 4.01 was the appropriate and correct legal instruction to be used that defines reasonable doubt. In Kalebaugh the court determined that the trial court correctly instructed the jury during preliminary remarks that reasonable doubt was 'a doubt for which reason could be given' consistent with WPIC 4.01 but then later paraphrased the explanation stating reasonable doubt was 'a doubt for which reason can be given.' The Supreme Court held the trial court's paraphrasing was harmless error beyond a reasonable doubt, rejecting the suggestion that the standard WPIC or paraphrase impermissibly required the jury to articulate or 'fill in the blank' for having reasonable doubt. *See also*, State v. Lizarraga, 191 Wn. App. 530, 364 P.3d 810, 830 (2015), as amended (Dec. 9, 2015). Balderas-Lopez cannot demonstrate the trial court's use of the standard reasonable doubt WPIC 4.01 was constitutionally erroneous or resulted in any actual prejudice. Balderas-Lopez argument should be rejected.

2. **Balderas-Lopez cannot show that the imposition of discretionary legal financial obligations constitutes a manifest error of constitutional magnitude that should be reviewed for the first time on appeal or results in sufficient prejudice to warrant reversal under an ineffective assistance of counsel claim where no enforcement or collection efforts have been made by the state.**

Next, Balderas-Lopez argues the trial court exceeded its statutory authority failing to consider his ability to pay prior to imposing discretionary legal financial obligations.

Balderas-Lopez did not object to the imposition of discretionary legal financial obligations. He therefore waived this issue unless he can demonstrate the alleged error constitutes a ‘manifest error affecting a constitutional right.’ RAP 2.5(a)(3). Not every constitutional error alleged falls within this exception. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995). Moreover, if the facts necessary to litigate the issue are not in the record, the error is not manifest. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Balderas-Lopez cannot demonstrate from this record, he raises a manifest error of constitutional magnitude.

In State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Blank, 131 Wn. 2d at 241, *quoting*, State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992). Therefore, a defendant can only raise a constitutional

objection at the time of collection and even then, the question is whether the defendant is ‘constitutionally indigent.’ State v. Johnson, 179 Wn.2d at 533.

Statutory indigence, as claimed by Balderas-Lopez based on his indigence filing following his conviction for purposes of obtaining an appellate attorney and assistance, is not the same as Constitutional indigence. State v. Johnson, 179 Wn.2d 534, 555, 315 P.3d 1090 (2014). Constitutional indigence requires examining the totality of the defendant’s financial circumstances to determine whether the defendant is constitutionally indigent for purposes of imposing a fine. State v. Johnson, 179 Wn.2d at 553. The record here fails to reflect the state is seeking to enforce the discretionary LFO’s Balderas Lopez complains of or, whether he is in fact constitutionally indigent for purposes of imposing the fines or enforcing them. In light of this record, Balderas-Lopez cannot demonstrate this alleged error constitutes a manifest error affecting a constitutional right that may be raised for the first time on appeal pursuant to RAP 2.5(a)(3). Review of this issue is not warranted.

Alternatively however, Balderas-Lopez argues his trial attorney was constitutionally ineffective by failing to object to the imposition of these fees; specifically, \$350 of discretionary fees imposed for crime lab

and a jury demand fee. Br. of App. at 25. Balderas-Lopez requests, on this basis, this court vacate the discretionary legal financial obligations and remand this matter back to the trial court for resentencing pursuant to State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015).

In order to support an ineffective assistance of counsel claim, Balderas-Lopez must demonstrate his attorney was constitutionally deficient and that the deficiency resulted in prejudice to Balderas-Lopez. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Even if Balderas-Lopez' attorneys failure to object to the imposition of discretionary legal financial obligations without consideration of whether Balderas-Lopez was constitutionally indigent is constitutionally deficient, Balderas-Lopez cannot demonstrate this alleged deficiency, resulted in the required prejudice to warrant relief.

In Blank, the court held that inquiry into a defendant' ability to pay is not constitutionally required before imposing a repayment obligation in an judgment and sentence, so long as the court examines a defendant's ability to pay prior to seeking sanctions for non-payment. There, the court determined it is the point of enforcement or collection that is the appropriate time to examine an individuals' ability to pay. State v. Blank, 131 Wn.2d at 239-42. Nothing in this record reflects the state is seeking to attempt to collect the discretionary fees Balderas-Lopez objects to.

Under these circumstances, Balderas-Lopez cannot demonstrate his attorney's alleged deficient conduct resulted in the requisite prejudice he must demonstrate to obtain the relief he requests. Furthermore, this record reflects any challenge to the judgment and sentence that is not yet subject to enforcement or collection is not yet ripe for review. State v. Lundy, 176 Wn.App. 96, 102, 308 P.3d 755 (2013).

Review of this issue for all of the above mentioned reasons should be declined. Alternatively, if this Court chooses to exercise its discretion, the State respectfully requests this matter be remanded back to the trial court for a hearing on the limited issue regarding Balderas-Lopez' ability to pay discretionary fines.

3. The majority of community custody provisions Balderas-Lopez complains of for the first time on appeal, are reasonably related to his underlying crime, are constitutional and should not be stricken.

Next, Balderas-Lopez asserts the sentencing court erred ordering, as a condition of his community custody, that he "submit to a polygraph or plethysmograph assessment at his own expense as directed by the department of corrections and therapist, but limited to topics related to monitoring compliance with crime related sentencing conditions." CP 46-61, 79. Balderas-Lopez seems to argue that this condition equates to an

impermissible monitoring tool that infringes on his constitutional right to be free from bodily intrusions. See, Br.of App. at 32 *citing*, State v. Land, 172 Wn.App. 593, 605, 295 P.3d 782 (2013).

Balderas-Lopez also asserts the community custody conditions prohibiting him dating or engaging in sexual activity without prior approval from DOC or his therapist, from possession ‘sexually explicit material in any form as described by the treatment provider or community corrections officer’ and the condition to refrain from withholding secrets from his treatment provider or department of corrections officer should also be stricken on constitutional grounds.

Pursuant to former RCW 9.94B.070 (2015) applicable to Balderas-Lopez’ February 2015 sentence, some community custody conditions recommended by the department of corrections for sex offenders are statutorily mandated, while others are discretionary; which includes affirmative conditions that may be imposed if they are reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.

Unless a condition is waived by the court, the conditions of community custody imposed under this section shall be the same as those provided for in RCW 9.94B.050 (5). As part of any sentence that includes a term of community custody imposed under this section, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.704.

Former RCW 9.94B.070 (2015) (effective 2009). Under former RCW 9.94B.050 (2015) (effective August 2009) the court has the discretion to impose the following conditions:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

Former RCW 9.94B.050 (2015), (effective 2009). Under subsection (e) the court may impose crime-related conditions, i.e., conditions “that directly relate[] to the circumstances of the crime for which the offender has been convicted, as a condition of community custody. See, RCW 9.94A.030(10).¹

Former RCW 9.94A.704 (2003) (re-codified as RCW 9.94A.703 effective July 2015) additionally provides, in part:

¹ Former RCW 9.94A.030(13). The definition has not changed and in full states:

“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.

(2)(a) The department shall assess the offender's risk of re-offense and may establish and modify additional conditions of community custody based upon the risk to community safety.

(4) The department may require the offender to participate in rehabilitative programs or otherwise perform affirmative conduct and to obey all laws.

A court's statutory authority regarding sentencing is reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). A court's decision regarding imposition of crime-related prohibitions is reviewed for abuse of discretion. State v. Williams, 157 Wn. App. 689, 691, 239 P.3d 600 (2010), *rev. denied*, ___ Wn.2d ___ (Jan. 5, 2011). Whether a condition is related to the circumstances of the crime has traditionally been left to the discretion of the sentencing judge. *Id.* "No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime." *Id.* at 691-92. "Accessory facts" may be considered by the sentencing court in determining what crime-related prohibitions may be imposed. *Id.* at 692 (court properly considered underlying child sex offense in imposing the crime-related condition of no unsupervised contact with minors in sentence on failure to register). A community custody condition is reviewed in the context of how such conditions are used for monitoring. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

a. Plethysmograph testing condition is appropriate if it is required as part of sexual deviancy evaluation and treatment.

As a condition of community custody, Balderas-Lopez has been ordered “to submit to polygraph and/or plethysmograph assessment at own expense as directed by the Department of Corrections and therapist, but limited to topics related to monitoring compliance with crime related sentencing conditions.” CP 58, Br. of App. at 32.

The trial court has authority to order a defendant to submit to plethysmograph testing only if the court also orders crime related treatment for sexual deviancy. State v. Riles, 135 Wn.2d 326, 345, 957 P.2d 655 (1998). Balderas-Lopez has been ordered to participate, as part of his judgment and sentence sexual deviancy treatment as recommended by the department of corrections. CP 46-61, page 4. Plethysmograph testing is only useful within the context of a comprehensive evaluation or sexual deviancy treatment process. *Id.* To the extent the judgment and sentence in Balderas-Lopez’ judgment and sentence states it may be ordered by the community corrections officer to monitor compliance with community custody conditions, the condition should be modified to state that the community corrections officer and therapists authority is limited to ordering plethysmograph testing only for purposes of sexual deviancy

evaluation/treatment and not for monitoring purposes. See, State v. Land, 172 Wn.App. 593, 605-6, 295 P.3d 782, *review denied*, 177 Wn.2d 1016, 304 P.3d 114 (2013).

b. Community Custody condition requiring pre approval prior to Banderas-Lopez dating or engaging in a sexual relationship is reasonably related to his crime and warranted as a tool to protect the community from similar future criminal acts.

Balderas-Lopez next complains the community custody condition prohibiting him from dating or engaging in sexual activity with others without prior approval from his CCO or therapist is ill conceived and not crime related. Br. of App. at 34. Statutorily however, a sentencing court has discretion to order an offender to refrain from direct or indirect contact with the victim of a crime or specified class of individuals. See Former RCW 9.94B.050 (b) (2015)(effective 2009 until July 2015), See, State v. Kinzle, 181 Wn.App. 774, 326 P.3d 870, *review denied*, 337 P.3d 325 (2014).

In Kinzle, the court rejected the defendant's challenge to a similar condition that the defendant claimed was overbroad, vague and unnecessary. The court held that because Kinzle obtained access to the children he victimized through an adult relationship, the condition prohibiting dating without prior approval, was appropriate and necessary to protect the public. The same analysis applies here. Balderas-Lopez was

a friend of the victim's mother who was called when the victim, her mother and a friend needed a ride home from a local casino after drinking too much to drive home. Balderas-Lopez engaged in criminal sexual behavior after returning with the victim, her mother and a friend to her mother's home. After more drinking and going to bed, Balderas-Lopez raped the victim while she slept. Given these circumstances, the condition that his therapist or community corrections officer pre-approve any dating or sexual relationship is appropriate. This condition is reasonably related to the underlying offense and necessary to protect the public from Balderas-Lopez taking criminal advantage of what otherwise would be an innocuous social situation.

Balderas-Lopez argues for the first time on appeal nonetheless, this condition violates his Constitutional right of association. Balderas-Lopez argument should be rejected because he makes no showing this error constitutes a manifest error of constitutional magnitude that may be raised for the first time on appeal. RAP 2.5(a)(3). Moreover, a convicted defendant's freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order. State v. Riley, 135 Wn.2d 326, 347, 957 P.2d 644 (1998), State v. Ancira, 107 Wn.App. 650, 654, 27 P.3d 1246 (2001).

In Riley, the court upheld a community custody condition that prohibited a computer hacker from owning a computer, associating with other hackers and communicating with computer bulletins during supervision. The court held these conditions would help prevent further similar criminal conduct and was therefore reasonably related to the offense and did not constitute an unconstitutional restriction. Similarly here, the sexual relations/ dating condition does not prohibit dating or sexual relationships but works to ensure any such relationships are safe and do not pose a risk to the community. Striking this community custody provision is not warranted.

c. The state concedes prohibition of possession of sexually explicit materials and to not withhold information or keep secrets should be stricken as a crime related condition of community custody.

Next, Balderas-Lopez contends the community custody condition prohibiting his from use or possession of ‘sexually explicit material’ in any form as proscribed by the treatment provider and or community corrections officer, including internet use and possession is not crime-related or constitutional. Br. of App. at 39. He also asserts, the sentencing condition requiring Balderas-Lopez not withhold information or secrets is unconstitutionally vague and should be stricken. See, Br. of App. at 35. The state concedes error.

In State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008), the Supreme Court addressed whether a community custody condition to “not possess or access pornographic materials, as directed” by the supervising community correction officer was constitutionally vague. Here, similar to Bahl, the contested community custody condition implicates Balderas-Lopez First Amendment rights. Moreover, the state concedes there is no evidence in the record to suggest that such materials were related or contributed to the crime. See, State v. O’Cain, 144 Wn.App. 772, 184 P.3d 1262 (2008). The state agrees this matter should be remanded back to the trial court to strike this community custody condition.

Balderas-Lopez also requests the court strike the community custody condition requiring him not to withhold information or secrets asserting this condition is unconstitutionally vague. The State concedes error and agrees this matter should be remanded back to the trial court to strike this community custody condition.

D. CONCLUSION

The State respectfully requests that this Court affirm Balderas-Lopez’s judgment and sentence; remanding only for the limited purpose of striking and or modify the terms of community custody as outlined above.

Respectfully submitted this 17th day of March 2016.

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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Jared Steed, addressed as follows:

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Legal Assistant

3/17/16

Date