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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34603-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

GARRETT R. MILLER,

Appellant.

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BRIEF OF APPELLANT

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 ORIGINAL

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## **ASSIGNMENT OF ERROR**

### *Assignment of Error*

1. Trial counsel's failure to object when a police officer testified that in his opinion the defendant was guilty violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

2. The trial court erred when it imposed community custody conditions not authorized by the legislature.

### *Issues Pertaining to Assignment of Error*

1. Does a defense attorney's failure to object when a police officer testifies that in his opinion the defendant was guilty violate that defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when but for that evidence the jury would have acquitted the defendant?.

2. Does a trial court err if it imposes community custody conditions not authorized by the legislature?

## STATEMENT OF THE CASE

### *Factual History*

In April of 2005, members of the Cowlitz-Wahkiakum County Drug Task Force (Task Force) arrested a person named Michael Nolte on charges of possession of cocaine and manufacturing marijuana. RP 64, 80. Mr. Nolte was a regular user of marijuana and had smoked it for the past ten years. RP 82-83. Mr. Nolte was not a stranger to the criminal justice system and had last been to prison for second degree assault, the last in a number of prior felony convictions. RP 64, 81. His standard range on the manufacturing charge was 60 months in prison. RP 64-65. Not wanting to go back to prison, Mr. Nolte retained an attorney and worked out a deal with the Cowlitz County Prosecutor's Office whereby he promised to make a number of drug purchases for the Task Force in return for dismissal of his charges. *Id.* Initially, his wrote out of list of at least ten different people from whom he claimed he could purchase drugs. RP 79. This list included the defendant, whom Mr. Nolte claimed he had known for at least 10 years. RP 65-66.

By October, Mr. Nolte and the Task Force Officers claimed that Mr. Nolte had purchased drugs from ten different people, some on multiple

occasions.<sup>1</sup> RP 79-81. However, under his agreement with the prosecutor he still had more drug purchases to make with the task force in order to avoid going to prison. RP 80-83. As a result, on October 21, 2005, he met with Task Force Officers at County Line park on the border between Cowlitz and Wahkiakum counties. RP 67-68. At that location one task force officer searched Mr. Nolte to verify that he had no drugs or money on him while another officer searched Mr. Nolte's vehicle. RP 6. The officer who searched Mr. Nolte looked in his pockets, waistband, and socks, but didn't do any type of strip search. RP 24. The officer who searched the vehicle looked between seats for "a couple of minutes." RP 43. These officers then followed Mr. Nolte to the trailer at 1087 Columbia Street where Mr. Nolte claimed the defendant Garrett Miller lived with his mother. RP 67-68. In the meantime, a surveillance officer situated himself so he could see the back of the trailer. RP 48.

According to the surveillance officer, once at the trailer Mr. Nolte walked around the back to a wooden porch and spoke with a male standing

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<sup>1</sup>Just what the officers meant when they said that Mr. Nolte had previously purchased drugs from six or seven different people was unclear. Apparently they meant that consistent with this case they followed Mr. Nolte to different locations when Mr. Nolte entered and then exited with drugs in his possession. None of the officers claimed that they ever witnessed a drug transactions themselves.

outside the back door. RP 50-52. A second male then exited the trailer and spoke with Mr. Nolte. *Id.* This person then went back inside the trailer while Mr. Nolte went to his vehicle. *Id.* As Mr. Nolte did this, the second person again exited the trailer but this time walked up to Mr. Nolte's vehicle. RP 51-53. At this point Mr. Nolte drove back to County Line Park. RP 41. The surveillance officer was too far away to identify anyone at the scene and only assumed that the person who drove up was the informant based upon radio traffic from the other two officers who watched Mr. Nolte drive up to the trailer. RP 51-53. He did not see any type of drug transaction or exchange occur. *Id.* The officers who followed Mr. Nolte to the trailer did not see anyone at all. RP 9-11, 40-43,

Once Mr. Nolte was back at County Line Park he handed one-quarter of an ounce of marijuana to the Task Force Officers. RP 12. According to Mr. Nolte, the defendant was the second person who came out of the trailer and when he came over to Mr. Nolte's vehicle he handed over the marijuana in exchange for some of the money the Task Force Officers gave to Mr. Nolte. RP 60-73.

#### ***Procedural History***

By information filed December 5, 2005, the Wahkiakum County Prosecutor charged Garrett Miller with one count of delivery of marijuana.

CP 1-2. The case came on for jury trial on March 23, 2006, with the state calling the three task force officers, Mr. Nolte, and an evidence technician who tested the marijuana. RP i. These witnesses testified to the facts set out in the preceding *Factual History*. RP 3-103. The state also played a recording of a body wire that Mr. Nolte was wearing. RP 71. On this tape Mr. Nolte's voice can be heard asking for a "quarter," and another male voice saying "Yeah, I got one." RP 60-65. The only witness to claim that this second voice was the defendant was Mr. Nolte. *Id.*

During the direct testimony of the surveillance officer, the following colloquy took place:

Q. (By Mr. Biglow) Do you have any – have you ever clapped eyes on the Defendant before to your knowledge?

A. Not before that operation, no.

Q. Okay. Do you recognize the person sitting in that chair from this operation?

A. I can't say that, no, not from my distance.

Q. So, when you say you saw that Defendant drive off, that's not something that we should necessarily take as gospel?

A. Well, after the operation I talked to Detective Ullmann and I talked to him about what had transpired and from that conversation with him, I know that Mr. Nolte conducted the transaction with the Defendant and that the Defendant was one of the persons that was in the rear of the residence whom I was watching.

RP 52.

The defense did not object to this testimony as hearsay, as speculation, or as improper opinion of guilt. *Id.* In fact, the defense did not object at all or move for a mistrial. *Id.*

The defense did not call any witnesses in this case and following instruction and argument the jury retired for deliberation. RP 103-122. During deliberations the jury sent out the following two questions:

Question #1 - Did Nolte have a quota or a time table to reduce his sentence?

Question #2 - Do any other males live at this residence?

CP 47.

The court refused to answer the questions and after further consideration the jury returned a verdict of guilty. CP 47, 48. The court later sentenced the defendant to a standard range sentence of 3 months incarceration and 12 months community custody along with a number of conditions on community custody. CP 58. These conditions included the following affirmative requirement.

Defendant shall be evaluated by an approved chemical dependency treatment agency and shall enter into, satisfactorily participate in, and successfully complete any recommended chemical dependency treatment program

CP 59.

Although the court ordered the defendant to obtain an evaluation and

treatment, the court did not find that the defendant was chemically dependant and the court did not find that any chemical dependency contributed to the offense. CP 54. In fact, the court could have made this finding simply by checking a box in front of the following possible finding on page two of the judgment and sentence.

- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

CP 54 (emphasis in original).

Following imposition of sentence the defendant filed timely notice of appeal. CP 67.

## ARGUMENT

### I. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN A POLICE OFFICER TESTIFIED THAT IN HIS OPINION THE DEFENDANT WAS GUILTY VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar defendant claims ineffective assistance for defense counsel's failure to object to James Wood's testimony that in his opinion, the defendant was guilty of the crimes charged. The following addresses this argument.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’ “ (Citations omitted.) 5A K.B. Tegland, *Wash.Prac., Evidence Sec.* 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.

To the expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury.

*State v. Carlin*, 40 Wn.App. 701 (some citations omitted).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that “[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the

defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. To the proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

To the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

*State v. Haga*, 8 Wn.App. At 491-492. *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the

alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

Unlike *Haga*, in which the jury had to “infer” the ambulance driver’s opinion as to the defendant’s guilt, in the case at bar, the jury heard the surveillance officer’s claim that he “knew” that the defendant had delivered marijuana to the informant. This occurred during direct testimony, which went as follows:

Q. (By Mr. Biglow) Do you have any – have you ever clapped eyes on the Defendant before to your knowledge?

A. Not before that operation, no.

Q. Okay. Do you recognize the person sitting in that chair from this operation?

A. I can’t say that, no, not from my distance.

Q. So when you say you saw that Defendant drive off, that’s not something that we should necessarily take as gospel?

A. Well, after the operation I talked to Detective Ullmann and I talked to him about what had transpired and from that conversation with him, ***I know that Mr. Nolte conducted the transaction with the Defendant and that the Defendant was one of the persons that was in the rear of the residence whom I was watching.***

RP 52 (emphasis added).

Not only was this evidence a grossly improper opinion as to guilt, it was also throughly false (as well as hearsay and speculation). This officer

had no idea who the defendant was either prior to or after the alleged sale of marijuana. In fact, at another point in his testimony he admitted that he was too far away to tell who was whom, and that he only assumed which person was the informant based upon what the other officers told him over the radio.

In this case, the defense theory of the case was threefold: (1) that the officers were unable to identify the defendant as the source of the marijuana, (2) that the only person who was able to say that the defendant supplied the marijuana was the informant, and (3) that based upon his motive to lie (to avoid 60 months in prison) and his disreputable criminal past, the jury could not say beyond a reasonable doubt that the informant was telling the truth. This theory of the case was not lost on the jury, who sent out two questions which bore directly on the defendant's theory of the case. These two questions were:

Question #1 - Did Nolte have a quota or a time table to reduce his sentence?

Question #2 - Do any other males live at this residence?

CP 47.

Given the defense theory of the case and the considerable question concerning the credibility of the informant, there was absolutely no good or even bad tactical reason for the defense to fail to object to the surveillance officer's improper testimony that he "knew" that the defendant had sold

marijuana to the informant. Indeed, it would be hard to come up with any scenario in which a defense attorney would not vociferously object to any witness's testimony that he or she "knew" that the defendant had committed the crime charged. The fact that this improper evidence came from a police officer is all the more objectionable and damaging. Thus, trial counsel's failure to object to this evidence fell below the standard of a reasonable prudent attorney.

As was already mentioned, the defense case cast considerable doubt upon the credibility of the informant. This doubt was not alleviated by the police officer's cursory search of the defendant and his vehicle, and their failure to identify the defendant as one of the people in the back yard. In addition, the state called no evidence to support the informant's claim that the residence of the alleged marijuana sale even belonged to the defendant's mother. Certainly this would have been a corroborating fact that could have easily been proven had it been true. Given this evidence, as well as the jury's questions relating directly to the informant's credibility, it is clear that the issue of guilt beyond a reasonable doubt was a close question in the mind of the jury. In such a case as this the officer's improper testimony that he "knew" that the defendant had sold marijuana to the informant stands as that key piece of evidence without which the state would not have secured a

conviction. Thus, trial counsel's failure to object to this improper evidence not only fell below the standard of a reasonable prudent attorney but it caused prejudice. As a result this failure to object denied the defendant his right to effective assistance of counsel under United States Constitution, Sixth Amendment and Washington Constitution, Article 1, § 22, and entitles him to a new trial.

## **II. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.**

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out these arguments.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may

impose as part of community custody. In this case, ~~the defendant~~ the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

The term “community custody” is defined as follows in RCW 9.94A.030(5):

(5) “Community custody” means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed pursuant to RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715, or 9.94A.545, served in the community subject to controls placed on the offender's movement and activities by the department. For offenders placed on community custody for crimes committed on or after July 1, 2000, the department shall assess the offender's risk of reoffense and may establish and modify conditions of community custody, in addition to those imposed by the court, based upon the risk to community safety.

RCW 9.94A.030(5).

The court’s authority to impose community custody as part of a felony sentence derives from RCW 9.94A.505(2)(a)(iii), (iv), (vii), (viii), and (xi), which state as follows:

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

. . . .

(iii) RCW 9.94A.710 and 9.94A.715, relating to community custody;

(iv) RCW 9.94A.545, relating to community custody for offenders whose term of confinement is one year or less;

. . . .

(vii) RCW 9.94A.650, relating to the first-time offender waiver;

(viii) RCW 9.94A.660, relating to the drug offender sentencing alternative;

(xi) RCW 9.94A.535, relating to exceptional sentences;  
RCW 9.94A.505(2)(a)(iii), (iv), (vii), (viii), and (xi).

Thus, following the conviction for any felony, the trial court has the authority to impose community custody as part of a sentence if the defendant's underlying crime fell within those offenses listed in RCW 9.94A.710, RCW 9.94A.715, or RCW 9.94A.545, or when the court imposes a first offender sentence under RCW 9.94A.650, a "DOSA" sentence not imposed under RCW 9.94A.660, or an exceptional sentence imposed under RCW 9.94A.535.

In the case at bar the court imposed a sentence under RCW 9.94A.545. This provision states:

Except as provided in RCW 9.94A.650, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

RCW 9.94A.545.

As this statute explicitly states the sentencing court "may impose up

to one year of community custody” for offenses under RCW 69.50 “with confinement of one year or less.” Thus the trial court in the case at bar had authority to impose community custody. In addition the statute also provides that the trial court may “subject the defendant to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720.” RCW 9.94A.720 mandates that the court require the defendant to submit to supervision of community custody by the Department of Corrections. Subsection 2 of RCW 9.94A.715 states the following concerning the conditions of community custody the trial court may impose:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of the offender’s community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease

court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special 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.

RCW 9.94A.700(5).

Under these provisions 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. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8<sup>th</sup> ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without

statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the defendant challenges the following condition of community custody condition the court imposed. It is:

Defendant shall be evaluated by an approved chemical dependency treatment agency and shall enter into, satisfactorily participate in, and successfully complete any recommended chemical dependency treatment program

CP 59.

Although the court ordered the defendant to obtain an evaluation and treatment, the court did not find that the defendant was chemically dependant and the court did not find that any chemical dependency contributed to the offense. CP 54. In fact, the court could have made this finding simply by checking a box in front of the following possible finding on page two of the judgment and sentence.

- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

CP 54 (emphasis in original).

In this case the state made no allegation that the defendant was under the influence of a controlled substance at the time of the offense, that he was

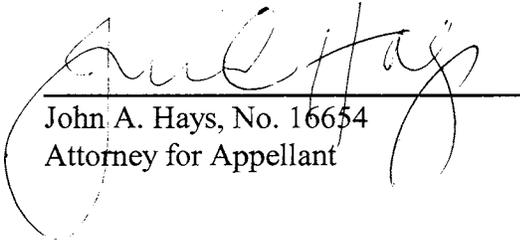
chemically dependant, or that a chemical dependency in any was contributed to the commission of the instant offense. Thus, the trial court erred when it imposed a community custody condition that required an evaluation and treatment.

## CONCLUSION

Trial counsel's failure to object when a police officer testified that he "knew" that the defendant was guilty denied the defendant his right to effective assistance of counsel under United States Constitution, Sixth Amendment and Washington Constitution, Article 1, § 22. As a result the defendant is entitled to a new trial. In the alternative the trial court erred when it imposed a community custody condition not authorized by the legislature.

DATED this 25<sup>th</sup> day of October, 2006.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **WASHINGTON CONSTITUTION ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

### **UNITED STATES CONSTITUTION, SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

#### **RCW 9.94A.545**

Except as provided in RCW 9.94A.650, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

#### **RCW 9.94A.700**

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the

department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special 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.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

## RCW 9.94A.715

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such

conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request

an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

#### **RCW 9.94A.720**

(1)(a) Except as provided in RCW 9.94A.501, all offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. The department may only supervise the offender's compliance with payment of legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.501.

(b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(c) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (b) of this subsection, any appropriate conditions of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specific class of individuals.

(d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

The conditions authorized under (c) of this subsection may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to RCW 9.94A.710 occurs during community custody,

it shall be deemed a violation of community placement for the purposes of RCW 9.94A.740 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.737. At any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to RCW 9.94A.710 or 9.94A.715 be continued beyond the expiration of the offender's term of community custody as authorized in RCW 9.94A.715 (3) or (5).

The department may require offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(2) No offender sentenced to terms involving community supervision, community restitution, community custody, or community placement under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions under RCW 9.94A.634, 9.94A.737, and 9.94A.740. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection has the same definition as in RCW 9.41.010.

FILED  
COURT OF APPEALS

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STATE OF WASHINGTON

BY     jn      
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

6 STATE OF WASHINGTON, )  
7 Respondent, )  
8 vs. )  
9 GARRETT R. MILLER, )  
10 Appellant, )

WAHKAIKUM CO. NO.05-1-00039-8  
APPEAL NO: 34603-6-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON )  
12 COUNTY OF WAHAKIAKUM ) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 25<sup>TH</sup> day of OCTOBER,  
14 2006, affiant deposited into the mails of the United States of America, a properly stamped  
15 envelope directed to:

15 FRED JOHNSON  
16 WAHAKIAKUM CO. PROSECUTING ATTY  
17 P.O. BOX 397  
18 CATHLAMET, WA 98612

GARRETT MILLER  
373 EAST SR 4  
CATHLAMET, WA 98612

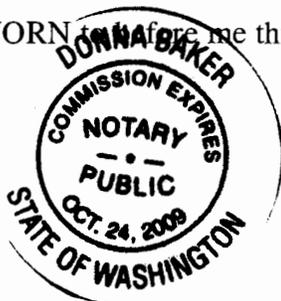
18 and that said envelope contained the following:

- 19 1. BRIEF OF APPELLANT
- 20 2. AFFIDAVIT OF MAILING

21 DATED this 25TH day of OCTOBER, 2006.

Cathy Russell  
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 25th day of OCTOBER, 2006.



Donna Baker  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09