

No. 34939-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID C. VESSEY,

Appellant.

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

The Honorable Kenneth D. Williams
The Honorable George Wood

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
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A. SUMMARY OF ARGUMENT

David Vessey contends this collateral challenge to a condition of his community placement is not time-barred even though more than one year has passed since his judgment became final. Two statutory exceptions to the one-year time limit for collateral attacks apply: (1) the sentence imposed was in excess of the court's jurisdiction; and (2) the community placement statute was unconstitutional as applied to Mr. Vessey's conduct.

B. ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Vessey's CrR 7.8 motion to vacate the condition of his community placement requiring him to remain out of places where alcohol is the chief item of sale.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The statutory one-year time limit for collateral attacks does not apply where the sentence was imposed in excess of statutory authority. Was the sentence in excess of the court's authority where the Sentencing Reform Act did not authorize the court to prohibit Mr. Vessey from going to places where alcohol is the chief item of sale, as there was no showing that alcohol contributed to the crime?

2. The statutory one-year time limit for collateral attacks does not apply where a statute is unconstitutional as applied to defendant's conduct. Was the statute unconstitutional as applied to Mr. Vessey's conduct where the community placement condition unreasonably infringed his constitutional right to freedom of association?

D. STATEMENT OF THE CASE

On June 9, 1999, David Vessey pled guilty to two charges of rape of a child in the second degree. CP 83. At sentencing, the court ordered Mr. Vessey to serve a standard range sentence of 119 months on each count, to be served concurrently. CP 88. The court also imposed a mandatory term of three years of community custody. CP 88. In addition to the "standard mandatory conditions" of community placement, the court imposed additional conditions. CP 88-89; Sub #39 (Conditions of community placement, Appendix A to judgment and sentence).¹ As one of the additional conditions, the court ordered that Mr. Vessey "shall abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale." Appendix. But the court made no findings, and the State

¹ A supplemental designation of clerk's papers has been filed for this document. For this Court's convenience, a copy of the document is attached to this brief as an appendix.

presented no evidence, that alcohol was directly related to the circumstances of the crime.

Mr. Vessey appealed the judgment and sentence, arguing the trial court did not properly consider imposing a Special Sex Offender Sentencing Alternative. In an unpublished decision, this Court affirmed the conviction and sentence. State v. Vessey, 2001 Wash. App. LEXIS 1142 (No. 25168-0-II, May 25, 2001). A mandate was issued on June 26, 2001. CP 93.

On May 18, 2006, Mr. Vessey, *pro se*, filed a CrR 7.8 motion in the trial court, requesting the court vacate the condition of community placement requiring that he abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale. CP 106-07. Mr. Vessey argued the court had exceeded its statutory authority in imposing the condition, as there was no evidence that alcohol was directly related to the circumstances of the crime. CP 107. Without reaching the merits of the argument, the trial court denied the motion, ruling the motion had not been "filed within a reasonable time." CP 110 (citing CrR 7.8).

E. ARGUMENT

THE CONDITION OF COMMUNITY PLACEMENT
REQUIRING MR. VESSEY TO REMAIN OUT OF PLACES
WHERE ALCOHOL IS THE CHIEF ITEM OF SALE MUST
BE STRICKEN

1. The motion to strike the condition of community

placement is not time-barred. The trial court ruled Mr. Vessey's motion to strike the alcohol prohibition from his judgment and sentence was untimely. CP 110. That conclusion is in error. Mr. Vessey's collateral challenge to his judgment and sentence is not time-barred, because it is based solely upon grounds enumerated in RCW 10.73.100. Thus, this Court must consider the merits of the claim.

a. A collateral challenge to a criminal sentence is not time barred if the challenge is based solely upon grounds enumerated in RCW 10.73.100. Mr. Vessey filed his motion to strike the condition of community placement under CrR 7.8. CP 106. That rule provides that, "[o]n motion and upon such terms as are just," a court may relieve a party from a final judgment for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due

diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b).

In his motion, Mr. Vessey argued the trial court exceeded its statutory authority in imposing a condition of community placement that was not crime-related. CP 107. This claim properly falls under CrR 7.8(b)(4), which provides that a defendant is entitled to relief from judgment if “[t]he judgment is void.” A void judgment is one entered by a court “which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved.” Dike v. Dike, 75 Wn.2d 1, 7, 448 P.2d 490 (1968).

Washington courts routinely recognize that a sentencing court lacks inherent power to impose a sentence that is not authorized by statute. It is axiomatic that a sentencing court’s authority to impose a sentence derives wholly from statute and that courts do not have inherent authority to sentence. See, e.g., State

v. Hughes, 154 Wn.2d 118, 149-51, 110 P.3d 192 (2005) (citing State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986)).

Where the court lacks statutory authority to impose the particular sentence, the judgment is fatally defective and open to collateral attack. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868-69, 50 P.3d 618 (2002). Moreover, a sentence that exceeds a court's statutory authority is such a fundamental defect that it may be challenged for the first time on appeal. Id. at 875-76; State v. Jones, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003) (challenge to conditions of community custody may be raised for first time on appeal) (citing State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) ("sentence imposed without statutory authority can be addressed for the first time on appeal")).

A CrR 7.8 motion to vacate a void judgment must be brought "within a reasonable time." CrR 7.8(b). Such motions are "further subject" to the time limitation for collateral attacks provided by RCW 10.73.090 and the exceptions to that limitation provided by RCW 10.73.100. CrR 7.8(b). CrR 7.8(b) must be read in conjunction with RCW 10.73.090 and .100, which override inconsistent provisions in court rules. State v. Clark, 75 Wn. App. 827, 831, 880 P.2d 562 (1994), rev'd on other grounds, 120 Wn.2d 365, 370, 842

P.2d 470 (1992). Therefore, a “reasonable time” to challenge a judgment and sentence pursuant to CrR 7.8(b) is defined by the specifications of RCW 10.73.090 and .100. Id.

Generally, a motion collaterally attacking a judgment in a criminal case must be brought within one year after the judgment becomes final if the judgment is valid on its face and rendered by a court of competent jurisdiction. RCW 10.73.090(1). The purpose of the statutory time limit is to streamline collateral review of judgments and sentences. In re Pers. Restraint of Runyan, 121 Wn.2d 432, 440, 853 P.2d 424 (1993). Where the time bar applies, unless the collateral petition is brought within the one-year limit, the reviewing court may not look behind the judgment to assess the merits of the claim. State v. Robinson, 104 Wn. App. 657, 662, 17 P.3d 653 (2001) (citing Runyan, 121 Wn.2d at 442-44).

The one-year statutory time limit does not apply, however, to a motion that is based solely upon one or more of the grounds enumerated in RCW 10.73.100. In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 348-49, 5 P.3d 1240 (2000). The time limit does not apply if the motion alleges: (1) newly discovered evidence; (2) a statute that is unconstitutional on its face or as applied to the defendant; (3) double jeopardy, (4) insufficiency of the evidence; (5)

a sentence in excess of the court's jurisdiction; or (6) a significant change in the law that is material to the conviction, sentence, or other order. RCW 10.73.100.

The exceptions provided by RCW 10.73.100 are to be interpreted broadly. Runyan, 121 Wn.2d at 440. They reflect the Legislature's recognition that such errors undermine the continued validity and fairness of the judgment and sentence to such an extent that a collateral attack based upon one or more of the enumerated grounds merits a full consideration of the record, beyond merely the face of the judgment and sentence. Robinson, 104 Wn. App. at 662 (citing Runyan, 121 Wn.2d at 442-44). Such errors are sufficiently serious they must be remedied even if more than one year has passed since the judgment became final. Runyan, 121 Wn.2d at 445.

b. The collateral challenge in this case is based solely upon grounds enumerated in RCW 10.73.100. Mr. Vessey contends the sentencing court exceeded its statutory authority in imposing a condition of community placement that was not crime-related or otherwise authorized by statute. That portion of the sentence was therefore "in excess of the court's jurisdiction," as defined by RCW 10.73.100(5). Moreover, the condition prohibiting

him from going to places where alcohol is the chief item of sale unreasonably restricts his constitutional right to freedom of association. Thus, the sentencing statute was unconstitutional as applied to Mr. Vessey's conduct and the exception provided by RCW 10.73.100(2) also applies. Because his collateral challenge is based solely upon grounds enumerated in RCW 10.73.100, Mr. Vessey was not required to bring the challenge within one year after the judgment and sentence was final.

i. The community placement condition was "in excess of the court's jurisdiction" as defined by RCW 10.73.100(5). Where a court imposes a sentence that exceeds the court's statutory authority, the erroneous portion of the sentence is "in excess of the court's jurisdiction" and may be challenged more than one year after the judgment is final. RCW 10.73.100(5); In re Pers. Restraint of Perkins, 143 Wn.2d 261, 263, 19 P.3d 1027 (2001); In re Pers. Restraint of Nichols, 120 Wn. App. 425, 429, 85 P.3d 955 (2004) (citing Goodwin, 146 Wn.2d at 869). Thus, the Washington Supreme Court has described the exception provided by RCW 10.73.100(5) as "the excessive sentence exception." Perkins, 143 Wn.2d at 263. In Perkins, the State conceded the exception applied to petitioner's collateral attack challenging his 81-month

sentence, as the sentence exceeded the statutory five-year maximum. Id.

This Court has similarly labeled this statutory exception as “the illegal sentence exception” to the time limit for collateral attacks. Nichols, 120 Wn. App. at 429 (citing Goodwin, 146 Wn.2d at 869). In Nichols, petitioner filed a collateral attack in which he argued several of the prior convictions included in his offender score had washed out. Id. at 427-28. Although the petition was filed more than one year after the judgment became final, this Court addressed the merits of the claim, explaining that it “invokes consideration of the illegal sentence exception to the time bar” provided by RCW 10.73.100(5). Id. at 429.

Mr. Vessey contends the exception provided in RCW 10.73.100(5) applies to this case, as the sentencing court exceeded its statutory authority in imposing the condition of community placement at issue. The court ordered that during community placement, Mr. Vessey “shall abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale.” Appendix. Mr. Vessey acknowledges the court was authorized by statute to require him to abstain from alcohol even though alcohol was not directly related to the circumstances of the crime. But the

court was not authorized to order Mr. Vessey to remain out of places where alcohol is the chief item of sale.

Mr. Vessey was convicted of the crime of rape of a child in the second degree, which is a "sex offense." Former RCW 9.94A.030(33)(a) (1998). At the time of the offense, the Sentencing Reform Act (SRA) required the court to impose three years of community custody for any sex offense. Former RCW 9.94A.120(10)(a) (1998).

The SRA required the court to impose six particular conditions of community placement unless waived by the court. Former RCW 9.94A.120(9)(b), (10)(b) (1998). The court was also authorized, at its discretion, to impose additional "special conditions" as follows:

(c) As a part of any sentence imposed under (a) or (b) of this subsection, the court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime-related treatment or counseling services;

(iv) The offender shall not consume alcohol;

(v) The offender shall comply with any crime-related prohibitions; or

(vi) For an offender convicted of a felony sex offense against a minor victim after June 6, 1996, the offender shall comply with any terms and conditions

of community placement imposed by the department of corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

Former RCW 9.94A.120(9)(c) (1998).

Of these discretionary conditions, only subsection four, which states “the offender shall not consume alcohol,” is not inherently crime-related. State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). A “[c]rime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” Former RCW 9.94A.030(11) (1998). Thus, the condition provided in RCW 9.94A.120(9)(c)(iv) requiring the offender not consume alcohol is authorized by statute even where there is no evidence that alcohol contributed to the offense. Jones, 118 Wn. App. at 206-07.

Other restrictions relating to alcohol, however, are not authorized by statute unless the trial court finds, and the evidence indicates, that alcohol was directly related to the circumstances of the crime. In Jones, defendant pled guilty to first degree burglary and other crimes. Id. at 202. Although there was no evidence, and the court made no finding, that alcohol contributed to the crimes, the court imposed a condition of community custody requiring that

defendant not consume alcohol and that he participate in alcohol counseling. Id. at 203. On review, this Court concluded that although the sentencing court had statutory authority to prohibit Jones from consuming alcohol, the court did not have authority to require Jones to participate in alcohol counseling unless that condition was “crime-related.” Id. at 207-08. This Court held the evidence must show and the trial court must find that alcohol contributed to the offense. Id. Because the record did not demonstrate that alcohol contributed to Jones’s offense, the trial court exceeded its authority in requiring Jones to participate in alcohol counseling. Id. at 212.

The outcome in Jones dictates the outcome here. Although the trial court had authority to require Mr. Vessey to abstain from alcohol regardless of whether alcohol contributed to the offense, the court did not have authority to order him to remain out of places where alcohol is the chief item of sale unless that prohibition was crime-related. But the court made no finding, and there is no showing in the record, that alcohol was directly related to the circumstances of the crime. Thus, the condition of community placement at issue was “in excess of the court’s jurisdiction.” RCW 10.73.100(5); Goodwin, 146 Wn.2d at 869; Perkins, 143 Wn.2d at

263; Nichols, 120 Wn. App. at 429. The one-year time bar does not apply and Mr. Vessey may challenge the condition on collateral review.

ii. The community placement condition was unconstitutional as applied to Mr. Vessey's conduct. The one-year statutory time bar for collateral attacks does not apply where the question raised is whether the court's application of a sentencing statute violated the offender's constitutional rights. RCW 10.73.100(2) (one-year time limit does not apply where motion alleges "[t]he statute that the defendant was convicted of violating was unconstitutional . . . as applied to the defendant's conduct"). Mr. Vessey contends the condition of community placement requiring that he stay out of places where alcohol is the chief item of sale violated his constitutional right to freedom of association. Thus, he may now challenge the condition on collateral review.

The right to move about freely is constitutionally protected. Tacoma v. Luvene, 118 Wn.2d 826, 840 n.5, 827 P.2d 1374 (1992) (citing Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989); Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990) (First Amendment right of freedom of association encompasses association to engage in political and nonpolitical speech);

Papachristou v. Jacksonville, 405 U.S. 156, 164-65, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (the right to walk, stroll, or wander aimlessly is a liberty “within the sensitive First Amendment area” that is protected by the Fourteenth Amendment)).

When an individual has committed a crime, his constitutional right to freedom of association may be limited during community placement. State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). But such limitations must be authorized by the SRA. Id. (citing State v. Ross, 129 Wn.2d 279, 286-87, 916 P.2d 405 (1996) (citing In re Caudle, 71 Wn. App. 679, 683, 863 P.2d 570 (1993) (Sweeney, J., concurring)). Moreover, any infringement upon a defendant’s constitutional rights during community placement must be necessary to accomplish the goals of punishment and protection of the public. Riles, 135 Wn.2d at 350; Ross, 129 Wn.2d at 287.

In Riles, defendant Gholston was convicted of raping a nineteen-year-old woman but the trial court ordered him not to have contact with “any minor-age children.” 135 Wn.2d at 349. The Supreme Court noted that the discretionary conditions authorized by the community placement statute, other than the one prohibiting consumption of alcohol, must be crime-related. Id. at 349-50. Because there was no reasonable relationship between the crime

and the order prohibiting contact with minors, the court held the community placement condition was not authorized by the SRA. Id.

Moreover, the restraint upon Gholston's constitutional right to freedom of association bore no reasonable relationship to the essential needs of the state and public order. Id. at 350. Thus, the provision "at least borders on unconstitutional overbreadness." Id. The court declined to hold the provision was an unconstitutional infringement, however, as "[t]he simple remedy is to delete the questionable provision from the order." Id.

Here, as discussed above, the community placement condition requiring Mr. Vessey to stay out of places where alcohol is the chief item of sale is not crime-related, as there is no showing that alcohol contributed to the current offense. Thus, the condition was not authorized by the SRA. Riles, 135 Wn.2d at 350. Moreover, the restraint upon Mr. Vessey's freedom of association bears no reasonable relationship to the essential needs of the state and public order. Thus, the condition impermissibly infringes Mr. Vessey's constitutional right to freedom of association. See Riles, 135 Wn.2d at 350. Because the community placement condition is unconstitutional, Mr. Vessey is not time-barred from raising this collateral challenge. RCW 10.73.100(2).

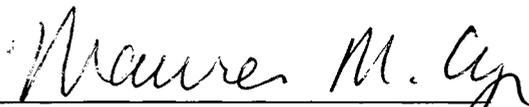
2. The community placement condition must be stricken.

Where a sentencing court imposes a sentence that exceeds the court's authority, the remedy is to strike that portion of the sentence that is invalid. Goodwin, 146 Wn.2d at 877; Riles, 135 Wn.2d at 350. Because the condition of Mr. Vessey's community placement requiring him to stay out of places where alcohol is the chief item of sale is not authorized by the SRA and unreasonably infringes his constitutional right to freedom of association, it must be stricken.

F. CONCLUSION

For the above reasons, Mr. Vessey respectfully requests this Court strike the community placement condition requiring him to stay out of places where alcohol is the chief item of sale.

Respectfully submitted this 4th day of January 2007.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

FILED
SEP 17 1999
CLALLAM CO. CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,
Plaintiff,
vs.
David Vessey,
Defendant.

NO. 99-1-00065-9

CONDITIONS OF
 SUSPENDED SENTENCE
 COMMUNITY SUPERVISION
 COMMUNITY PLACEMENT
APPENDIX A
/ JUDGMENT & SENTENCE

The conditions of the Suspended Sentence, Community Supervision, and/or **Community Placement** are as follows:

- 1. You shall comply with the statutory requirements of community placement, RCW 9.94A.120(8)(b)(c), and other conditions as set forth in Judgment and Sentence.
- 2. You shall report as directed to the Office of Community Corrections or the Court.
- 3. You shall notify the Superior Court Clerk and Office of Community Corrections prior to any change of address or employment.
- 4. You shall pay monetary obligations as set forth in the Judgment and Sentence.
- 5. You shall remain within prescribed geographical boundaries, as follows: AD SET BY DEPT. OF CORRECTIONS
- 6. You shall not contact or communicate with: Samantha Johnson 3/16/85
- 7. You shall not have direct or indirect contact with the following specified class of individuals: Female under age 18
- 8. You shall abstain from the use of alcohol and remain out of places where alcohol is the chief item of sale.
- 9. You shall abstain from the possession or use of drugs unless prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.

JUDGMENT AND SENTENCE (Appendix A,
Conditions of Supervision/Placement)

CLALLAM COUNTY PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street
Port Angeles, WA 98362
(360) 417-2301 FAX (360) 417-2469

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10. During term of community supervision, you shall submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections requirements.

11. You shall undergo out-patient treatment as prescribed by the Court or the Office of Community Corrections as follows: _____

12. You shall undergo in-patient/out-patient sex offender treatment as set forth below or attached hereto and incorporated by reference: with a state certified and DOC approved sexual deviant treatment provider

13. Do not use or possess firearms.

14. Do not drive a motor vehicle.

15. Refrain from further violations of the law.

16. You shall pay the cost of counseling to the victim which is required as a result of your crime or crimes.

17. Your residence and living arrangements shall be subject to the prior approval of the Department of Corrections.

18. Other crime-related prohibitions as follows: _____

Violations of the conditions or requirements of this Appendix to Judgment and Sentence will result in additional punishment.

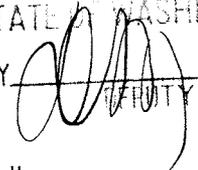
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 DAVID VESSEY,)
)
 Appellant.)

STATE OF WASHINGTON
BY 

COA NO. 34939-6-II

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 4TH DAY OF JANUARY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> TIMOTHY DAVIS, DPA
CLALLAM COUNTY PROSECUTOR'S OFFICE
223 E 4 TH ST.
PORT ANGELES, WA 98362 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> DAVID VESSEY
796858
MONROE CORRECTIONAL COMPLEX
PO BOX 888
MONROE, WA 98272 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF JANUARY, 2007.

x 

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COURT OF APPEALS
DIVISION II
JAN 10 2007
SEATTLE, WA