

No. 34939-6-II

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THIS COURT MUST STRIKE THE CONDITION OF
COMMUNITY CUSTODY REQUIRING VESSEY TO
REMAIN OUT OF PLACES WHERE ALCOHOL IS THE
CHIEF ITEM OF SALE

The State contends this Court should uphold the condition of community custody requiring Vessey to remain out of places where alcohol is the chief item of sale. First, the State argues this collateral attack is time-barred because the judgment and sentence is valid on its face. Second, the State argues the Sentencing Reform Act (SRA) authorized the trial court to impose the condition, despite the lack of evidence that alcohol directly related to the circumstances of the crime. Finally, the State argues the restriction on Vessey's constitutional rights to move about and associate with others was reasonably necessary to accomplish the essential needs of the State.

Each of these contentions must be rejected. The collateral attack is not time-barred, because it falls under one or more of the statutory exceptions to the time bar. Moreover, the trial court exceeded its statutory authority and violated Vessey's constitutional rights by restricting his freedom of movement and association absent a greater showing that there is a connection between Vessey's exposure to alcohol and commission of the crimes.

1. This collateral attack is not time-barred. The State contends the statutory time bar for collateral attacks precluded the trial court from considering Vessey's motion, because the judgment and sentence is valid on its face. SRB at 4-6. This is incorrect. Because Vessey's motion falls under two of the statutory exceptions to the time bar, the trial court was required to consider the merits of the motion.

The statute provides that the one-year time bar for collateral attacks applies in the first place only if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment and sentence becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1).

If these conditions exist, the court must still consider whether the claim falls under one of the exceptions provided by RCW 10.73.100. The time bar does not apply if the collateral attack is based solely on one or more of these exceptions:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100. Thus, even if the judgment and sentence is valid on its face, if the claim is based solely on one or more of the statutory exceptions, the court must consider the merits of the claim.

The Washington Supreme Court has applied the time-bar statute consistent with this analysis and the plain words of the statute. The court has explained that when a collateral attack is filed more than one year after final judgment, it “is barred unless it falls under a statutory exception or the conviction is facially invalid.” In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001) (emphasis added). The petitioner must establish the claim satisfies the conditions of RCW 10.73.090(1) only if it is *not* “based solely” on one or more of the grounds specified in RCW 10.73.100. In re Pers. Restraint of Stenson, 150 Wn.2d 207, 220, 76 P.3d 241 (2003).

The State relies on State v. Robinson, 104 Wn. App. 657, 17 P.3d 653 (2001) to argue that Vessey’s claim is time-barred because the judgment and sentence is valid on its face. In Robinson, Robinson filed a motion to withdraw her guilty plea more than one year after judgment was final, arguing her deadly weapon enhancement conviction was void. Id. at 661. Robinson argued the judgment and sentence was invalid on its face because the sentencing court did not enter a finding that she was armed with a deadly weapon at the time of the robbery as required by RCW 9.94A.125. Id. at 662-63. She also argued the exception provided

by RCW 10.73.100(2) applied because her due process rights were therefore violated. Id. at 663. Finally, she argued the exception provided by RCW 10.73.100(4) also applied because the evidence was insufficient to support a deadly weapon finding, if one had been made. Id.

The Court of Appeals concluded Robinson's collateral attack was time-barred. The court held the judgment and sentence was valid on its face, because it stated the court had made a finding regarding the deadly weapon enhancement as required by RCW 9.94A.125. Id. at 664. Thus, because the merits of the claim could be assessed from the face of the judgment and sentence, the court did not further address whether the exceptions provided by RCW 10.73.100(2) and (4) applied.

To the extent Robinson stands for the proposition that a collateral attack filed more than one year after judgment becomes final is time-barred merely if the judgment and sentence is valid on its face, Robinson is inconsistent with the plain words of the statute and the binding case law cited above. Even if the judgment and sentence is valid on its face, the court must determine if the petition is based solely on one or more of the exceptions provided by RCW 10.73.100.

Regardless of the merits of the Robinson court's facial validity analysis, the outcome of the case is correct. The court was not required to consider further the exceptions in RCW 10.73.100 because the petition was "mixed." If a collateral petition is based on any grounds outside RCW 10.73.100 it is a "mixed" petition subject to the one-year time limit unless it satisfies the conditions stated in RCW 10.73.090. In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 345-46, 349, 5 P.3d 1240 (2000). Moreover, even if the petition asserts one of the exceptions, if the claim does not satisfy the conditions of the exception, it is "mixed." Stenson, 150 Wn.2d at 220. The petition in Robinson was "mixed" because Robinson raised a claim of ineffective assistance of counsel, which did not fit under any of the provisions of RCW 10.73.100. 104 Wn. App. at 663. Moreover, the court determined the due process claim was belied by the face of the judgment and sentence. Id. at 664. Thus, the petition was "mixed."

Claims raised in a "mixed" petition will be addressed only if they satisfy the conditions of RCW 10.73.090(1), namely claims that challenge the facial validity of the judgment and sentence or the jurisdiction of the court. Stenson, 150 Wn.2d at 220. The time limit specified in RCW 10.73.090(1) is not, however, fatal to a

petition that is "based solely" on the six exceptions listed in RCW 10.73.100. Stoudmire, 141 Wn.2d at 345-46.

Here, as explained in the opening brief, Vessey's motion is "based solely" on two of the exceptions listed in RCW 10.73.100. The condition of community custody at issue was in excess of the sentencing court's statutory authority and thus the exception provided in RCW 10.73.100(5) applies. In addition, the condition unreasonably restricted Vessey's constitutional rights to move about and associate with others and thus RCW 10.73.100(2) applies. This Court must therefore consider the merits of the claim.

2. The condition of community custody was in excess of the court's statutory authority. The State contends the trial court had authority under the SRA to impose this "standard" condition of community custody even if it is not crime-related. SRB at 3. Alternatively, the State suggests the condition *is* crime-related because there is no showing alcohol did *not* play a role in the crimes and because it is well-known that alcohol lowers a person's inhibitions. SRB at 8-9, 11.

These contentions must be rejected. Although Washington courts recognize the SRA authorizes a sentencing court to prohibit a person from consuming alcohol during community custody, even

if alcohol did not play a role in the crime, courts also uniformly require that other discretionary conditions of community custody be crime-related. The condition prohibiting Vessey from going to places where alcohol is the chief item of sale is not crime-related, as any connection between these crimes and Vessey's exposure to alcohol is purely speculative. The court therefore did not have authority to impose the condition.

At the time Vessey was sentenced, the community custody statute authorized the court to impose, at its discretion, these 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).

The Washington Supreme Court has interpreted this provision to require that all the enumerated discretionary conditions of community custody, other than the one prohibiting consumption of alcohol, be crime-related. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). In Riles, defendant Gholston challenged a condition of community custody preventing him from contacting minor-age children, where he was convicted of raping a 19-year-old woman. Id. at 338. The Court of Appeals had upheld the condition, concluding it did not fall under former RCW 9.94A.120(9)(c)(v) regarding crime-related prohibitions, but instead fell under subsection (ii), which, according to the Court of Appeals, did not need to be crime-related. Id.

The Supreme Court explicitly rejected the Court of Appeals' interpretation of the statute. The court acknowledged there was "no express requirement under RCW 9.94A.120(9)(c) that the special conditions be crime-related," but nonetheless concluded, "a reading of its subsections indicates that five of the six conditions are in fact crime-related." Id. The court reasoned to conclude otherwise would be unreasonable and illogical:

RCW 9.94A.120(9)(c)(ii) gives courts authority to order offenders to have no contact with victims or a 'specific class of individuals.' The 'specified class of individuals' seems in context to require some

relationship to the crime. It would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as from contact with other children. It is not reasonable, though, to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime.

Id. at 349-50. In other words, conditions of community custody must be reasonable, and they cannot be reasonable unless they are related to the crime.

In State v. Letourneau, 100 Wn. App. 424, 431, 997 P.2d 436 (2000), the Court of Appeals similarly interpreted the statute to require that discretionary conditions of community custody, other than the one prohibiting consumption of alcohol, be crime-related. The court explained that, in drafting the SRA, the Legislature specifically rejected "the broad discretion judges traditionally had in imposing conditions of probation." Id. at 432. Instead, conditions of community custody must be reasonable and consistent with the purposes of the SRA, which are to impose just punishment, protect the public, and offer the offender an opportunity for self-improvement. Id. at 431. But although offering the offender an opportunity for self-improvement is a legitimate goal, a condition is not justified on that ground alone if it is not crime-related:

The SRA embodies the Legislature's reservations about the efficacy of coerced rehabilitation--offenders

may be offered an opportunity to improve themselves and may be prohibited from doing things that are directly related to their crimes but may not be coerced into doing things that are believed will rehabilitate them under the guise of crime-related prohibitions. This is why the Legislature defined "crime-related prohibitions" to include conduct directly related to the crime but to exclude directing the offender affirmatively to participate in rehabilitative programs or otherwise to perform affirmative conduct. State v. Parramore, 53 Wn. App. 527, 529-30, 768 P.2d 530 (1989) (citing David Boerner, Sentencing in Washington, § 4.5, at 4-6 (1985)).

Id. at 431.

In sum, courts uniformly require that the statutory discretionary conditions of community custody, other than the one prohibiting consumption of alcohol, be crime-related. Indeed, the State cites no case where the court upheld a condition of community custody, other than one prohibiting consumption of alcohol, that was not crime-related.

A "crime-related prohibition" is "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). The conduct prohibited during community custody must be *directly* related to the crime. Letourneau, 100 Wn. App. at 432, 435. Thus, in Letourneau, the court rejected a claim that a condition of Letourneau's community custody prohibiting her

from profiting from commercialization of her story was crime-related. Id. at 435. Because there was no showing that Letourneau committed the crime in order to profit, or that allowing her to profit would increase the likelihood of reoffense, the condition was not directly related to the circumstances of the crime. Id. Although there was some evidence that Letourneau's media exposure undermined the efficacy of treatment, this connection was too indirect to uphold the condition prohibiting her from profiting from her story. Id.

Similarly, here, the evidence is insufficient to show a direct connection between Vessey's exposure to alcohol and the circumstances of the crime. There is no evidence that Vessey drank excessively or that his alcohol usage lowered his inhibitions or otherwise led him to commit the offenses. There is no evidence that allowing Vessey to be around alcohol will increase the likelihood of reoffense. The State suggests alcohol was directly related to these crimes because *in general* alcohol usage decreases inhibitions and encourages risk-taking behavior. But any claim that the circumstances of these crimes fit within this generalization is purely speculation. Moreover, it must be kept in mind that Vessey will be prohibited from drinking alcohol during

community custody. The question at issue is whether his mere exposure to alcohol is directly related to the circumstances of the crime. Any connection between these crimes and Vessey's exposure to alcohol is simply too indirect and tenuous to justify the prohibition. The court therefore exceeded its statutory authority in imposing the condition.

3. The community custody condition violated Vessey's constitutional rights. For many of the same reasons outlined above, this Court must similarly reject the State's contention that the restriction on Vessey's constitutional rights to move about and associate with others was justified.

A convicted person's freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order. Riles, 135 Wn.2d at 347. Because, as outlined above, there is no direct relationship between the crimes and Vessey's exposure to alcohol, the condition prohibiting him from going to places where alcohol is the chief item of sale is not reasonably necessary to accomplish the essential needs of the state and public order.

Preventing harm to children is a compelling state interest. Letourneau, 100 Wn. App. at 439. But limiting an offender's

fundamental rights in the interest of protecting children is constitutional only if it is reasonably necessary to achieve that aim. In Letourneau, Letourneau was convicted of second degree rape of a child. Id. at 426. As a condition of her sentence, the court ordered that she have no unsupervised in-person contact with minor children, including her own biological children. Id. The Court of Appeals concluded the prohibition was not reasonably necessary to prevent harm to Letourneau's children, as there was no evidence that Letourneau had molested her own children or that she was a pedophile. Id. at 439. The court rejected the State's argument that the condition was justified on the basis that many offenders who molest children unrelated to them later molest their own biological children. Id. at 442. The court explained that this general observation, without more,

is an insufficient basis for State interference with fundamental parenting rights. There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention. Nothing in this record rises to that level.

Id.

Similarly, here, as discussed above, there is no affirmative showing that Vessey is a problem drinker or that exposure to

alcohol increases the likelihood he will reoffend. The State's general observations that alcohol decreases a person's inhibitions are insufficient, without more, to justify restricting his fundamental constitutional rights.

In determining whether a condition of community custody is a reasonable infringement on constitutional rights, the court should also ask whether the State's interests are adequately protected by other less-restrictive conditions. In State v. Ancira, 107 Wn. App. 650, 652-53, 27 P.3d 1246 (2001), following his conviction for felony violation of a no-contact order, the court ordered Ancira to stay away from his wife and his two minor children for a period of five years, on the theory that witnessing domestic violence was harmful to the children. The court concluded the condition precluding Ancira from contacting his children was not reasonably necessary to protect them from witnessing domestic violence. Id. at 654. The court explained, "[t]he State has not explained why prohibiting Ancira from contacting his wife would not protect the children from the harm of witnessing domestic violence between the parents." Id. at 655.

Similarly, here, the State argues that restricting Vessey's exposure to alcohol is reasonably necessary to protect children.

But the State does not explain why the condition prohibiting Vessey from consuming alcohol would not protect children from any danger he might pose while under the influence of alcohol. Given that the State's aims can be achieved through less restrictive means, the substantial restriction on Vessey's freedom to move about and associate with others is not reasonably necessary to achieve the State's goals.

Finally, contrary to the State's suggestions, this restriction on Vessey's constitutional rights is substantial. Not only must Vessey stay out of taverns, bars and liquor stores, but he will also be barred from many restaurants, casinos, convenience stores and other places where people often congregate to socialize or discuss business matters. Where alcohol did not play a role in the crimes, this significant restriction on Vessey's rights is unnecessary and unreasonable.

B. CONCLUSION

For the reasons stated here and in his opening brief, Vessey requests this Court strike the condition of community custody prohibiting him from going to places where alcohol is the chief item of sale.

Respectfully submitted this 10th day of May, 2007.


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	COA NO. 34939-6-II
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DAVID VESSEY,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 10TH DAY OF MAY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|-------------------------------------|
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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MAY, 2007.

x _____ 

MAY 10 2007
CLALLAM COUNTY PROSECUTOR'S OFFICE
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