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NO. 35628-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID L. ERICKSON,

Appellant.

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STATE OF WASHINGTON
DEPT. OF JUSTICE

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

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional rights to a public trial.

2. The trial court erred by denying the appellant's motion for a new trial based on the ineffective assistance of trial counsel.

3. The trial court exceeded its statutory sentencing authority by imposing as a condition of community custody that the appellant not possess alcohol.

4. The trial court exceeded its statutory sentencing authority by imposing as a condition of community custody that the appellant participate in a chemical dependency assessment and follow all treatment recommendations.

5. The trial court's community custody condition prohibiting the appellant from possessing or perusing pornographic materials, which would be defined by his community corrections officer, was unconstitutionally vague and an improper delegation of the court's sentencing authority.

Issues Pertaining to Assignments of Error¹

1. The trial court conducted part of the voir dire regarding five prospective jurors in the jury room, with only the judge, counsel and court reporter present.² Where the trial court did not analyze the “*Bone-Club*”³ factors before ordering the private voir dire, did the trial court’s exclusion of the public violate the appellant’s constitutional rights to a public trial?

2. The only witnesses to the incidents that gave rise to the charges were the complainant, who was six years old at the time of trial, and the appellant. The state’s case consisted of the victim’s testimony and her pretrial statements, which came in under the child hearsay statute through her grandmother, her mother, and a child interview specialist. Defense counsel failed to present the testimony of four individuals who would have testified they were familiar with the appellant and he had a reputation for good sexual morality and decency. Did counsel’s failure

¹ The 10-volume verbatim report of proceedings (“VRP”) is sequentially paginated. Erickson’s thus refers to the VRP as “RP.”

² The private questioning of the first four jurors occurred September 5. RP 288-331. The fifth juror was briefly questioned in the jury room the following day. RP 376-78. Neither the court reporter’s official report of proceedings nor the minutes indicate whether Erickson joined counsel in the jury room on either date. Supp. CP __ (Memorandum of Journal Entry, p. 5 of 12, filed 9/14/2006); RP 288-331.

³ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 629 (1984).

constitute ineffective assistance, thereby resulting in the deprivation of substantial justice?

3. Where alcohol played no role in the commission of the appellant's crimes, did the trial court exceed its sentencing authority by including as a condition of community custody that the appellant refrain from possessing alcohol?

4. Where there was no evidence the appellant was chemically dependent and the trial court did not follow required statutory procedures, did the court exceed its sentencing authority by finding chemical dependency contributed to the offense, thus justifying evaluation and recommended treatment conditions of community custody?

5. The trial court imposed the following community custody condition: "Do not possess or peruse pornographic materials, including computer websites. Your community corrections officer will define pornographic material." Is the court's condition unconstitutionally vague and an improper delegation of its sentencing authority?

B. STATEMENT OF THE CASE

1. *Procedural Facts*

The state charged the appellant, David L. Erickson, with two counts of first degree child rape against his girlfriend's daughter, M.T. CP 9-10, RP 691-94. A Pierce County jury found Erickson guilty as charged. CP 27-28. Between the return of the verdicts and sentencing, Erickson was assigned new counsel, who filed a motion for a new trial based on ineffective assistance of trial counsel. RP 1026. CP 33-39, RP 1033-37. The trial court denied the motion. RP 1043-46. The court sentenced Erickson to a standard range minimum term of 140 months and a statutory maximum term of life. CP 46-49.

2. *Closed voir dire*

At the end of the first day of jury selection, the trial court asked which panelists desired to be examined privately about certain matters. RP 286-87. Four venire persons accepted the court's offer. RP 287-88. The court excused the remaining potential jurors for the day. RP 286-87. The trial court, counsel and the court reporter retired to the jury room. RP 288. The trial court called each of the four venire persons into the jury individually while the others waited in the courtroom. RP 288. The prosecutor and defense counsel examined the first three panel members. RP 288-328. After each potential juror was questioned and left the jury

room, the trial court permitted counsel to move to have the individual removed for cause. RP 300. Defense counsel challenged two prospective jurors for cause. RP 300-01, 325. The trial court denied each challenge. RP 302-04, 327-28. Counsel later spent a peremptory challenge to excuse the first venire member he challenged for cause (prospective juror # 15). RP 519. The fourth prospective juror, who personally knew defense and was self-employed, answered questions from the court and was excused for cause. RP 328-31.

The following day, the trial court examined a fifth venire member in the jury room, again with counsel and the court reporter present. Supp. CP __ (Memorandum of Journal Entry, p. 5 of 12, filed 9/14/2006); RP 376-78.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED ERICKSON'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The trial court questioned four venire persons in the jury room with only counsel, Erickson and a court reporter present. The trial court violated Erickson's constitutional rights to a public trial by prohibiting the public from observing this examination. The violation of these rights constitutes structural error and reversal and remand for a new trial are required.

Under both the Washington and United States constitutions, a

defendant has a constitutional right to a speedy and public trial. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. *Easterling*, 157 Wn.2d at 174. The First Amendment implicitly protects the same right. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Prejudice is presumed where there is violation of the right to a public trial. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 110 P.3d 291 (2004). The remedy is reversal of the convictions and remand for a new trial. *Orange*, 152 Wn.2d at 814. In other words, the violation of the right to open court proceedings is structural error. *State v. Watt*, 160 Wn.2d 626, 632, 160 P.3d 640 (2007). Whether a trial court has violated the defendant's right to a public trial is a question of law this Court reviews de novo. *Easterling*, 157 Wn.2d at 173-74.

The right to a public trial encompasses jury voir. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). Even where, as in Erickson's case, only part of jury selection is improperly closed to the public, such closure can violate a defendant's constitutional right to a public trial. See *State v. Frawley*, ___ Wn. App. ___, ___, ___ P.3d ___, 2007 Wash. App. LEXIS 2622, at *2-*4 (2007) (trial court's private

portion of jury selection, which addressed each venire person's answers to a jury questionnaire, violated right to public trial); *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 473-75, 722 N.E.2d 979 (Mass. App. Ct. 2000) (trial court's entry of jury room with counsel and a court reporter to answer juror's questions three times during deliberations violated Sixth Amendment right to public trial), *review denied*, 431 Mass. 1103 (2000).

The right to a public trial is not absolute. *State v. Bone-Club*, 128 Wn. 2d 254, 259, 906 P.2d 325 (1984). A trial court may restrict the right only "under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial from the public, it must first apply on the record the five factors set forth in *Bone-Club. Orange*, 152 Wn.2d at 806-07, 809. The court must also enter specific findings that justify a closure order. *Easterling*, 157 Wn.2d at 175.

The *Bone-Club* requirements are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of*

Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In *Brightman*, the trial court told counsel it was barring all spectators from observing jury selection because of safety concerns. *Brightman*, 155 Wn.2d at 511. The court, however, failed to analyze the five *Bone-Club* factors. The *Brightman* Court held because the record indicated the trial court did not consider Brightman's public trial right as required by *Bone-Club*, it was unable to determine whether the closure was proper. *Brightman*, 155 Wn.2d at 518. The Court remanded for a new trial. *Brightman*, 155 Wn.2d at 518; *see also Frawley*, ___ Wn. App. at ___, 2007 Wash. App. LEXIS 2622 at *4 (declining state's invitation to apply *Bone-Club* factors for first time on appeal because review is of trial court's consideration of factors as found in record and because trial court record was inadequate to apply factors).

The state argued Brightman failed to prove the trial court in fact closed the courtroom during jury selection and if it was closed, the closure was de minimis. *Brightman*, 155 Wn.2d at 515-17. The Court rejected both arguments. The Court first ruled when the plain language of a trial judge's ruling calls for closure, the state bears the heavy burden to overcome the strong presumption the courtroom was closed. *Brightman*, 155 Wn.2d at 516. Second, the Court held where jury selection or a part of the selection is closed, the closure is not de minimis or trivial.

Brightman, 155 Wn.2d at 517.

In Erickson's case, the trial court conducted individual voir dire of four panel members who requested privacy in the jury room, with only the judge, court reporter and counsel present. Private questioning of individual jurors violates the right to an open trial. *Frawley*, ___ Wn. App. at ___, 2007 Wash. App. LEXIS 2622 at *2-*4; *Storer Broadcasting Co. v. Circuit Court*, 131 Wis.2d 342, 388 N.W. 633 (Wis. App. Ct. 1986).

The trial court's conduct found to be improper in *Storer* is remarkably similar to that of Erickson's trial judge. The trial court allowed private questioning, limited to three subjects, of those prospective jurors who requested such examination in open court. *Storer*, 131 Wis.2d at 345-46. The court held no formal hearing and entered no factual findings. *Storer*, 131 Wis.2d at 346. As in Washington, the Wisconsin Supreme Court required trial courts to follow a particular procedure before closing jury voir dire, which included the court to recite on the record the factors compelling closure and why those factors override the presumptive value of a public trial. *Storer*, 131 Wis.2d at 348.

The *Storer* court held the trial court abused its discretion by failing to follow the Supreme Court's procedure. *Storer*, 131 Wis.2d at 349-350. The reviewing court found the trial court based its closure decision on its unsupported belief the defendant could not receive a fair trial without

partially private voir dire. *Storer*, 131 Wis.2d at 350. The appellate court held instead of the private examination of certain jurors, the trial court could simply have moved the rest of the venire panel out of the courtroom and questioned individual in open court. *Storer*, 131 Wis.2d at 350. Using that easy method, the reviewing court held, the risk of contaminating the entire panel would have been avoided without trampling on the public's right to know what was happening during trial. *Storer*, 131 Wis.2d at 350.

This same obvious alternative to private jury voir was available to Erickson's trial judge. Rather than questioning the potential jurors in the jury room, the trial court could have removed the rest of the venire panel and conducted individual questioning in open court. By not considering this alternative, or applying the *Bone-Club* factors before barring the entire public from viewing voir dire, the trial judge violated Erickson's right to a public trial. *Orange*, 152 Wn.2d at 812.

Even were it proper for this Court to independently analyze the *Bone-Club* factors, the jury voir dire closure was illegal. The record fails to show a compelling interest for the private jury voir dire. Nor did the trial court give anyone present in the courtroom a chance to object to being barred from observing an important part of the trial proceedings. Further, the record fails to establish the trial court's chosen method was the least

restrictive means available for protecting any perceived threatened interests or was no broader in its application or duration than necessary to serve its purpose.

Because the trial court failed to analyze the *Bone-Club* factors before excluding the public from a portion of jury voir dire, Erickson's constitutional right to a public trial was violated. Moreover, on the existing record, analysis of the *Bone-Club* factors leads to the same conclusion.

The State may argue because there is no showing Erickson's counsel objected to the closed jury voir dire, the issue is waived. That argument fails. Defense counsel in both *Orange* and *Brightman* also failed to object to the closed jury voir dire. *Orange*, 152 Wn.2d at 801-02; *Brightman*, 155 Wn.2d at 517. The Court in *Brightman* held failure to object did not waive the right to a public trial." *Brightman*, 155 Wn.2d at 517 (citing *Bone-Club*, 128 Wn.2d at 257). Further, it is the trial judge's obligation to seek the defendant's objection to any closure. *Easterling*, 157 Wn.2d at 175-76 n.7. Finally, the waiver of a constitutional right must be knowing and voluntary. *Frawley*, __ Wn. App. at __, 2007 Wash. App. Lexis 2622 at *3.

The state may also attempt to distinguish Erickson's case from *Brightman* because only a portion of jury voir dire was private. Such an argument is also unavailing. The *Brightman* Court ruled where jury selection or a part of the jury selection is closed, the closure is not de

minimis or trivial. *Brightman*, 155 Wn.2d at 517. The *Frawley* court also found the defendant's right to a public trial violated where the trial court questioned individual venire members privately only as to their answers to a questionnaire. *Frawley*, __ Wn. App. at __, 2007 Wash. App. Lexis 2622 at *2-*4; *see also, Patry*, 48 Mass. App. Ct. at 474-76 (trial court violated Sixth Amendment right to public trial by instructing jurors three separate times in jury room); *Storer*, 131 Wis. 2d at 345-50 (trial court abused its discretion by permitting limited questioning of selected jurors in chambers without first conducting a hearing or making factual findings to support partial closure).

The state may also contend Erickson's case is distinguishable because in *Brightman* and *Orange* the trial courts court closed the courtrooms rather than conducting partial voir dire in the jury room. Such a claim would be baseless. The constitutional public trial right is the right to have a trial open to the public. *Orange*, 152 Wn.2d at 804-05. This right is for the benefit of the accused because it guarantees the electorate may observe he is dealt with fairly and emphasizes to the court, prosecutors and jurors the importance of their responsibility and duties. *Bone-Club*, 128 Wn.2d at 259.

Whether jury voir dire is conducted in a closed courtroom, a jury room, or a judge's chambers is a distinction without a difference. The point

of the constitutional rights to a public and open trial is to guarantee access to the public, which the trial court failed to do when it conducted questioning of Erickson's potential triers in the jury room.

The trial court violated Erickson's constitutional right to a public trial. His convictions should be reversed and the cause remanded for a new trial. *Easterling*, 157 Wn.2d at 182.

2. THE TRIAL COURT ERRED BY DENYING ERICKSON'S MOTION FOR NEW TRIAL BASED ON INEFFECTIVENESS OF TRIAL COUNSEL.

a. Summary of argument

The only eyewitnesses to Erickson's alleged transgressions were M.T. and Erickson. The jury's credibility assessment of these two witnesses was determinative. Under these circumstances, a reasonably competent defense attorney would have called witnesses to testify Erickson had a good reputation for sexual morality. Trial counsel's failure to do so prejudicially undermined Erickson's defense of denial. The trial court erred by finding otherwise and denying Erickson's motion for a new trial.

b. Summary of pertinent facts

The state's case rested on the testimony of M.T., who was six years old at the time of trial and 3 years old to five years old during the charging period, as well as M.T.'s grandmother, mother and a child interviewer,

who testified as to statements M.T. made more than one year before trial accusing Erickson of raping her. RP 540, 580-82, 691, 780-83.

But for the four-page testimony of a police officer, RP 815-818, trial counsel called only Erickson a witness. RP 819. Erickson denied M.T.'s accusations. RP 862-63. During their respective closing arguments, both parties contended credibility was the primary. RP 937 (prosecutor); RP 987 (defense counsel).

In his new trial motion, Erickson contended he was denied substantial justice. CP 33-34; RP 1033; *see* CrR 7.5(a)(8) (“The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: . . . [t]hat substantial justice has not been done.”). He argued trial counsel violated his constitutional rights to effective assistance of counsel for failing to call four witnesses, each of whom would have testified they observed Erickson with children and he had a good reputation for sexual morality. CP 33-36; RP 1033-37.

The trial court conceded Erickson’s case was close. RP 1044. The court nevertheless denied the motion, finding Erickson failed to satisfy the “prejudice” prong of the *Strickland*⁴ test because there was no evidence

⁴ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, L. Ed. 2d 674 (1984).

besmirching Erickson's morality. RP 1044-46.

c. The trial court erred by denying the new trial motion.

A trial court abuses its discretion by erroneously denying a motion for new trial. *State v. Cardenas*, 146 Wn.2d 400, 412, 47 P.3d 127, 57 P.3d 1156 (2002), *cert. denied*, 438 U.S. 912 (2003). Where the motion alleges ineffective assistance, this Court applies the "Strickland" standard. *State v. Dawkins*, 71 Wn. App. 902, 906-07, 863 P.2d 124 (1993).

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Personal Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, the appellant must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In evaluating whether the "deficient performance," prong is met, the quality of counsel's representation is determined by reference to an objective standard of reasonableness based on consideration of all of the circumstances. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 8 (1987). Deficient performance cannot be found if counsel's decision is tactically

sound. *State v. Pottorff*, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). To meet the prejudice prong, the appellant must show that, but for the deficient performance, there is a reasonable probability the verdict would have been different. *State v. B.J.S.*, 137 Wn. App. 622, 632, 154 P.3d 930 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

A claim of incompetent counsel may be based on a showing counsel failed to subpoena necessary witnesses. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). A defendant may call witnesses who are prepared to testify to the defendant's reputation for good sexual morality because such evidence is a pertinent character trait in child sex cases. *State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), *abrogated on other grounds*, *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). Evidence of a character trait is relevant because it permits, but not require, the jury to infer from the trait it is unlikely or improbable the accused committed the offenses. *State v. Thomas*, 110 Wn.2d 859, 865, 757 P.2d 512 (1988). This is especially so where, as in Erickson's case, credibility of the complainant and accused is the only factual question. *See Thomas*, 110 Wn.2d at 864 (in third degree rape case where adult defendant was convicted of raping a 14-year-old girl, court observed, "Defendant's evidence of a character trait was admitted in careful compliance with ER 404(a)(1). The sole factual question

of relevance here was whether the jury believed the victim who, with plausible reasoning, positively identified the defendant, or whether it believed the defendant, who denied everything.”⁵

Although a decision whether to call witnesses is generally a matter of legitimate trial tactics, such failure cannot be considered legitimate strategy when it is unreasonable and when it creates a reasonable probability that, had the witnesses been called, the jury’s verdicts would have been different. *State v. David*, 134 Wn. App. 470, 483, 141 P.3d 646 (2006), *review denied*, 160 Wn.2d 1012 (2007).

There is nothing in the record here to support an assertion trial counsel’s failure to call the four individual identified in Erickson’s new trial motion constituted legitimate trial tactics. Trial counsel did not testify at the hearing on the motion for new trial. Although it did not find counsel’s failure to call the character witnesses was legitimate, the trial court remarked counsel may have concluded he did not want to present witnesses who had “very little to offer” and would “waste the jury’s time” because the state presented no evidence placing Erickson’s morals into doubt.

⁵ *But see State v. Jackson*, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986) (“[O]ne’s reputation for moral decency is not pertinent to whether one has committed indecent liberties or incest. The trial court properly refused to permit Jackson’s witnesses to testify concerning his reputation for sexual morality and decency.”)

There are two problems with this reasoning. First, the trial court's comments were speculative. More importantly, the trial court overlooked the inherently inflammatory nature of M.T.'s accusations. Further, especially after hearing the testimony of a six-year-old girl, her mother, grandmother and a child interview specialist, there is a substantial likelihood a reasonable juror would have looked at Erickson as suffering from a sexual perversion. The sworn testimony of four witnesses who knew Erickson well that Erickson had a good reputation for sexual morality can hardly be considered trivial or a "waste of time."

Failing to present evidence that would have buttressed Erickson's assertion he did not inappropriately touch M.T. cannot be considered legitimate strategy. Failing to call the witnesses fell below an objective standard of reasonable representation and therefore constitutes deficient performance. Finally, by depriving Erickson of evidence that would have bolstered his credibility where credibility was the central issue, trial counsel's deficient performance caused a reasonable probability the jury's verdict would have been different. Erickson therefore suffered prejudice as a result of counsel's deficient performance.

Counsel's performance prejudiced Erickson for a second reason as well. Where a party properly introduces character evidence, a trial court should instruct the jury as follows:

Any evidence which bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining whether or not the defendant is guilty. However, even if you find that the defendant is a person of good character or reputation, you should not acquit if you are convinced beyond a reasonable doubt of the defendant's guilt.

Thomas, 110 Wn.2d at 866-67. This instruction would have emphasized to the jury the importance of the proffered "good reputation" evidence.

The trial court abused its discretion by failing to grasp the relevance of reputation evidence in Erickson's case and by denying his new trial motion. Erickson respectfully requests this Court to reverse the trial court's decision and to remand his cause for a new trial.

3. THE TRIAL COURT ACTED BEYOND ITS SENTENCING AUTHORITY BY INCLUDING WITHIN ITS COMMUNITY CUSTODY CONDITIONS A PROHIBITION ON THE POSSESSION OF ALCOHOL.

The trial court's community custody condition (b)(13) prohibits Erickson from possessing or consuming alcohol. CP 57. Erickson acknowledges RCW 9.94A.700(5)(d) authorizes the trial court to prohibit Erickson from consuming alcohol. This statutory authority, however, does not extend to possessing alcohol. Alcohol played no role in Erickson's offenses. The trial court therefore exceeded its sentencing authority by prohibiting Erickson from possessing alcohol. This court should remand Erickson's case and order the possession of alcohol portion of the trial court's condition stricken.

Whether the trial court acted outside its statutory authority in imposing the community custody condition challenged herein is an issue that may be raised for the first time on appeal. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001). Moreover, Erickson has standing to challenge these conditions even though he has not been charged with violating them. *State v. Riles*, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), *affirmed on other grounds*, 135 Wn.2d 326 (1998).

An offender convicted of first degree child rape is sentenced under RCW 9.94A.712. That statute authorizes a trial court to impose a term of community custody for any period of time the person is released from total confinement before the expiration of the maximum sentence. RCW 9.94A.712(5). The statutory maximum term for first degree rape of a child is life. RCW 9.44.073(2) (first degree child rape is class A felony).

Under RCW 9.94A.712(6)(a)(i), unless the court waives a condition, the conditions of community custody shall include those set forth in RCW 9.94A.700(4), and may include those provided for in RCW 9.94A.700(5). In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community”

RCW 9.94A.700(5) provides:

- (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.

Among other conditions, the trial court properly prohibited Erickson from consuming alcohol. However, the court went further by also prohibiting Erickson from possessing alcohol. CP 57 (Condition (b)(13)). This condition could not be imposed if reasonably related to the circumstances of Erickson's offense. Under *State v. Jones*,⁶ it does not.

The court sentenced Jones after accepting his pleas. There was no evidence alcohol played a role in Jones's crimes. Following the prosecutor's recommendation, the court imposed a concurrent prison term for each crime as well as a concurrent term of community custody. As conditions of community custody, the court ordered Jones not to consume alcohol and to participate in alcohol counseling. The court made no finding alcohol

⁶ 118 Wn. App. 199, 203, 76 P.3d 258 (2003).

contributed to Jones' crimes. *Jones*, 118 Wn. App. at 202-03.

On appeal, the *Jones* court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence that alcohol contributed to his crimes. *Jones*, 118 Wn. App. at 207-08.

In reaching this conclusion, the court first observed that RCW 9.94A.700(5)(c) provides a trial court, when imposing community custody for specified crimes, may order an offender to "participate in crime-related treatment or counseling services." *Jones*, 118 Wn. App. at 207. The Court held because the evidence failed to show alcohol contributed to Jones's offenses, or the trial court's alcohol counseling condition was "crime-related," the trial court erred by ordering Jones to participate in alcohol counseling. *Jones*, 118 Wn. App. at 207-08.

However, the Court also acknowledged that RCW 9.94A.715(2)(b) permitted a trial court to order an 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[.]" *Jones*, 118 Wn. App. at 208. The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s

requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same statutory language analyzed in *Jones* applies to Erickson's case. Therefore, the analysis of *Jones* should be applied here. Just as there was no evidence alcohol contributed to *Jones*' offenses, there was likewise no evidence alcohol contributed to Erickson's offense. The community custody condition requiring Erickson to refrain from possessing alcohol is not reasonably related to the circumstances of Erickson's offense. *See, State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and *Parramore*'s conviction for delivering marijuana).

In response to Erickson's challenge to the possession prohibition, the state may argue that the prohibition on possessing alcohol should be characterized as a "monitoring tool," which the court may order to monitor Johnson's compliance with the condition that he not consume alcohol. This argument should be rejected.

In *Riles*, the court held polygraph testing is a monitoring tool, rather than a crime-related prohibition, because it does not prohibit any conduct.

Riles, 86 Wn. App. at 16. In *Parramore*, this Court held urinalysis testing is a monitoring tool, rather than affirmative conduct, because submission to testing is merely passive, uncommitted conduct. *Parramore*, 53 Wn. App. at 532. In contrast, the condition to refrain from possessing alcohol prohibits conduct. It is thus not a passive monitoring tool.

It is certainly possible to possess alcohol and not drink it. For example, as the host of a party, Erickson might like to have alcohol available for his guests, with no intent to drink any himself.

For these reasons, the trial court's condition prohibiting possession of alcohol should be stricken from Erickson's judgment and sentence. *Jones*, 118 Wn. App. at 207-08, 212.

4. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY BY ORDERING ERICKSON TO PARTICIPATE IN A CHEMICAL DEPENDENCY ASSESSMENT.

The trial court ordered Erickson to “[p]articipate in a Chemical Dependency Assessment and follow prescribed recommendations.” CP 58 (Condition (b)(29)). The court, however, failed to follow statutory requirements before imposing the condition. Moreover, there was no evidence establishing Erickson was chemically dependent. This condition should therefore be stricken.

RCW 9.94A.607(1) authorizes a trial court to find an offender's chemical dependency contributed to the offense and justifies treatment

conditions:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

Although not specified, any affirmative treatment obligations are part of community custody. *In re Childers*, 135 Wn. App. 37, 41, 143 P.3d 831 (2006) (because Childers was not subject to a term of community custody, the sentencing court erred by imposing the chemical dependency conditions).

In RCW 9.94A.500(1), the legislature specified a procedure by which a trial court may impose chemical dependency conditions:

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense. . . .

Here the trial court neither specifically waived nor ordered a chemical dependency screening report. Again in this respect, Erickson's case is similar to *Jones*. The *Jones* court held the sentencing judge erred

when, without following statutory prerequisites, it ordered mental health treatment and counseling. *Jones*, 118 Wn. App. at 209.

Finally, a trial court may base its sentence only on evidence in the record. *State v. Payne*, 117 Wn. App. 99, 105, 69 P.3d 889 (2003). Because there was no evidence of chemical dependency here, the trial court erred by entering the finding. The chemical dependency finding should therefore be stricken from Erickson's judgment and sentence. *Jones*, 118 Wn. App. at 212.

5. THE TRIAL COURT'S COMMUNITY CUSTODY CONDITION PROHIBITING POSSESSION OF PERUSAL OF PORNOGRAPHIC MATERIALS IS UNCONSTITUTIONALLY VAGUE.

The trial court imposed as a community custody condition a prohibition on possession or perusal of "pornographic" materials. CP 57 (condition (b)(15)). The same condition states, "Your community corrections officer [CCO] will define pornographic material." CP 57. The term "pornographic" is unconstitutionally vague. Further, by directing the CCO to define "pornographic material," the trial court improperly delegated its sentencing authority.

Article I, section 3 of the Washington Constitution and the Fourteenth Amendment protect citizens from impermissibly vague penal statutes. *State v. Baldwin*, 111 Wn. App. 631, 647, 45 P.3d 1093 (2002), *aff'd. on other grounds*, 150 Wn.2d 448 (2003). The vagueness doctrine

serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Sullivan*, 143 Wn.2d 162, 181-182, 19 P.3d 1012 (2001).

In *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005), the court held the following condition of community placement was unconstitutionally vague: "[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or [CCO]. Pornographic materials are to be defined by the therapist and/or [CCO]." *Sansone*, 127 Wn. App. at 634- 35.

Here, the pornography prohibition imposed upon Erickson is similarly vague. The term has not been defined in a way that ordinary people can understand what it encompasses. This is supported by the fact the community custody condition includes a statement the CCO will define what is pornographic. This requirement would be unnecessary if "pornography" were inherently definite. The condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

Were Erickson to run across pornographic materials, even inadvertently, he would be unable to ascertain whether they were pornographic without showing them to the CCO to obtain a determination, which itself exposes him to risk of violation.

Moreover, this Court held in *Sansone* that the sentencing court improperly delegated its authority to the Department of Corrections (DOC) to "define" pornography. *Sansone*, 127 Wn. App. at 642. Sentencing courts do have the power to delegate some aspects of community placement to the DOC. *Sansone*, 127 Wn. App. at 642. Although the judiciary's function is to determine guilt and impose sentences, "the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature." *Sansone*, 127 Wn. App. at 642 (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937)).

Sentencing courts may not, however, delegate excessively. A sentencing court "may not wholesaledly 'abdicate . . . its judicial responsibility' for setting the conditions of release." *Sansone*, 127 Wn. App. at 642 (citing *United States v. Loy*, 237 F.3d 251, 266 (3rd Cir. 2001)) (quoting *United States v. Mohammad*, 53 F.3d 1426, 1438 (7th Cir.1995)). A sentencing court cannot cure an unconstitutionally vague condition by

permitting the CCO an uncontrolled power of interpretation, as this would delegate basic policy matters to the officer for resolution on an ad hoc and subjective basis. *Sansone*, 127 Wn. App. at 642. Here, the delegation to Bahl's CCO to "direct" whether something Bahl possessed or accessed is pornography was improper; it was not an administrative detail that could be properly delegated to the CCO. *Sansone*, 127 Wn. App. at 642.

Division One of this Court rejected this argument in *State v. Bahl*, 137 Wn. App. 709, 159 P.3d 416 (2007), *petition for review pending*. The *Bahl* court held an appellant may not challenge a sentencing condition as unconstitutionally vague until the person sentenced has been found to have violated an allegedly vague condition. *See Bahl*, 137 Wn. App. at 719 (“Because Bahl has not explained why his vagueness challenge requires evaluation of the conditions in a factual vacuum, we decline to review it.”).

The *Bahl* court’s refusal to reach the vagueness challenge pre-enforcement conflicts with other Court of Appeals decisions. *State v. Llamas-Villa*⁷ was the first case in Washington in which an appellant argued a community placement condition, rather than a statute or ordinance, was unconstitutionally vague and overbroad. Before he was charged with a violation, Llamas challenged the condition he not associate with persons using, possessing, or dealing with controlled substances. *Llamas-Villa*, 67

⁷ 67 Wn. App. 448, 455, 836 P.2d 239 (1992).

Wn. App. at 454-55. The Court of Appeals reached his claim and determined the condition provided sufficient notice of what conduct was forbidden and was neither vague nor overbroad. *Llamas-Villa*, 67 Wn. App. at 456.

Following *Llamas-Villa*, the court took the same approach in *Riles*. *Riles* challenged as unconstitutionally vague the following conditions of community placement: (1) that he have no contact with children; (2) that he avoid locations where children gather; and (3) that he not frequent places where children are known to congregate. *Riles*, 86 Wn. App. at 17. Following the two-step test set forth in *Sullivan*, the court concluded a person of common intelligence would understand from the language of the conditions what conduct was prohibited and that the language prevented arbitrary enforcement. *Riles*, 86 Wn. App. at 18.

Less than a year ago, in *State v. Autrey*,⁸ two appellants challenged in part on vagueness grounds community custody conditions requiring explicit consent before sexual contact and prior approval from their therapist and/or CCO. *Autrey*, 136 Wn App. at 466. Neither appellant had been charged with violating the conditions. *Autrey*, 136 Wn. App. at 466. The court nevertheless reached the issue and, after applying the two-part test, rejected the appellants' challenges. *Autrey*, 136 Wn. App. at 467-468.

⁸ 136 Wn App. 460, 466, 150 P.3d 580 (2006).

The *Bahl* court's refusal to review pre-enforcement vagueness challenges conflicts with these decisions. Likewise, its decision not to review Bahl's challenge to the prohibition on pornography as defined by his CCO as an excessive delegation of authority for the first time on appeal conflicts with other decisions. *See e.g. Riles*, 86 Wn. App. at 13 (challenge to community placement condition may be raised for first time on appeal) (*citing State v. Anderson*, 58 Wn. App. 107, 110, 791 P.2d 547 (1990)).⁹

Not only does *Bahl* conflict with numerous cases, but also it could lead to unnecessary litigation. Permitting an appellant to challenge an arguably vague condition for the first time on appeal prevents piecemeal reviews of the same case and thus promotes judicial efficiency. *United States v. Loy*, 237 F.3d 251, 253-54, 261 (3rd Cir. 2001) (court rejected government's contention Loy's challenge to vague pornography sentencing condition should not be reached pre-enforcement in part because such review promotes judicial efficiency); *see generally Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977) (there is substantial reason to follow overall policy against piecemeal appeals).

Relatedly, sentencing courts must impose certain community custody conditions in many circumstances and may impose others. RCW

⁹ *But see, State v. Smith*, 130 Wn. App. 721, 729-30, 123 P.3d 896 (2005) (court refused to reach challenge to delegation because it was not raised in the trial court), *review denied*, 157 Wash.2d 1026 (2006).

9.94A.715, 9.94A.700(4), (5). One of those conditions is that an offender shall comply with any crime related-prohibitions. RCW 9.94A.700(5)(e). This condition allows courts considerable leeway in determining what conduct an offender may be forbidden from doing, and lends it to conditions that can be vaguely worded and overbroad. Vaguely worded conditions require offenders to guess whether their conduct violates a sentencing condition, exposes them to needless incarceration and causes a further drain on judicial resources.

A good example is *Sansone*. There, the trial court imposed a condition prohibiting Sansone from “possess[ing] or perus[ing] pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or [CCO]. Pornographic materials are to be defined by the therapist and/or [CCO].” *Sansone*, 127 Wn. App. at 634-35.

During a meeting Sansone had with his CCO, the officer observed photographs she believed were inappropriate for a sex offender to possess, and took Sansone into custody for an alleged violation of the pornography prohibition. *Sansone*, 127 Wn. App. at 635. This arrest resulted in a violation hearing before a superior court judge, who after hearing testimony and argument found Sansone violated the condition. *Sansone*, 127 Wn. App. at 635. Sansone appealed, was appointed an attorney at public expense, and ultimately prevailed. *Sansone*, 127 Wn. App. at 639-42.

Under *Bahl*, this would be the required procedure anytime an offender wished to challenge an allegedly vague sentencing condition. Failing to review a challenge to an allegedly vague sentencing condition pre-enforcement results in potentially unnecessary and wasteful judicial proceedings.

Additionally, as illustrated by *Sansone*, the refusal to address *Bahl*'s facial vagueness challenge results in potentially substantial hardships for all offenders obliged to follow arguably vague community custody conditions. *Loy*, 237 F.3d at 257. Rather than determining whether a condition is vague and, if so, remanding for further clarification or striking the condition, refusal to address such challenges requires an offender to wait until he is arrested and go through a hearing to determine whether he or she has violated the condition. *Loy*, 237 F.3d at 257. This is contrary to the Supreme Court's declaration in *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1216, 39 L. Ed. 2d 505 (1974), which held it is not necessary that the petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute he claims deters the exercise of his constitutional rights.

Erickson urges this Court to reject the holding in *Bahl*, follow the reasoning of the *Sansone* court, and find the prohibition on possession or perusal of "pornographic" materials unconstitutionally vague. Erickson

also respectfully requests this Court find the trial court improperly delegated its sentencing authority to the CCO by charging the CCO with the duty to define pornographic materials.

D. CONCLUSION

This Court should reverse Erickson's conviction and remand for a new open and public trial as guaranteed by the state and federal constitutions. This court should also reverse the trial court's denial of Erickson's new trial motion and remand for a new trial. Alternatively, this court should remand Erickson's judgment and sentence with an order to strike the improper community custody conditions.

DATED this 27 day of September, 2007.

Respectfully submitted,

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

STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.)
)
 DAVID ERICKSON,)
)
 Appellant.)

COA NO. 35628-7-II

COURT OF APPEALS
DIVISION II
07 OCT -1 AM 9:09
STATE OF WASHINGTON
BY *David Erickson*
DEPUTY

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF SEPTEMBER 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
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ROOM 946
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- [X] DAVID ERICKSON
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2007 SEP 27 PM 4:13
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF SEPTEMBER 2007.

x *Patrick Mayovsky*