

NO. 35779-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RUSSELL R. VANT,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richaard A. Strophy, Judge
Cause No. 06-1-01817-0

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count II, violation of order of protection, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in calculating Vant's offender score by including a 1984 U.S.D.C., Georgia conviction without performing a comparability analysis.
03. The trial court erred in calculating Vant's offender score when it included his two alleged prior criminal convictions for SOR violations in determining his offender score.
04. The trial court erred in ordering Vant to submit to random urinalysis/ PBT/BAC per CCO, not to possess or peruse any sexual explicit images per CCO and to submit to random polygraph per CCO.
05. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Raven Carter's mother's residence was Raven Carter's residence on August 29, 2006? [Assignment of Error No. 1].
02. Whether there was sufficient evidence that Vant willfully violated the order of protection by knowingly going to his

mother's house on August 29, 2006?
[Assignment of Error No. 1].

03. Whether the trial court erred in calculating Vant's offender score by including a 1984 U.S.D.C., Georgia conviction for rape with a deadly weapon without performing a comparability analysis? [Assignment of Error No. 2].
04. Whether the trial court erred in calculating Vant's offender score when it included his two alleged prior criminal convictions for SOR violations in determining his offender score? [Assignment of Error No. 3].
05. Whether the trial court erred in ordering Vant to submit to random urinalysis/ PBT/BAC per CCO, not to possess or peruse any sexual explicit images per CCO and to submit to random polygraph per CCO? [Assignment of Error No. 4].
06. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Russell R. Vant (Vant) was charged by
First Amended Information filed in Thurston County Superior Court on
December 20, 2006, with violation of sex offender registration, count I,

and violation of order prohibiting contact, count II, contrary to RCWs 9A.44.130(11)(a), 26.50.110(1), 10.99.020 and 10.99.050. [CP 7-8].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or 3.6 hearing. Trial to a jury commenced on December 20, the Honorable Richard A. Strophy presiding. Neither objections nor exceptions were raised to the jury instructions. [RP 12/20/06 119].

The jury returned verdicts of guilty as charged, Vant was sentenced within his standard range and timely notice of this appeal followed. [CP 30-43, 47].

02. Substantive Facts

02.1 Count I: Sex Offender Registration

Eric Kolb, a detective in the sexual offender registration unit, supervised Vant as a sexual offender. [RP 12/20/06 36-37]. On July 14, 2006, Vance met with Kolb, “registered as a transient in Thurston County” [RP 12/20/06 39] and was advised and acknowledged that he was required to “check in every single Monday.” [RP 12/20/06 42-43]. Vant stopped reporting on August 14. [RP 12/20/06 53-56].

At the time of trial, Vant “stipulate(d) to having been previously convicted of a felony sex offense(.)” [RP 12/20/2006 63]. He testified that Kolb had explained the rules of registration to him but that his “comprehension is not that good.” [RP 12/20/2006 77]. “As soon as my

sister told me that they were looking for me, I called in immediately.” [RP 12/20/2006 80]. When asked during cross-examination if he reported to the police after August 14, Vant responded: “I’m not aware of what I did or didn’t do.” [RP 12/20/2006 84].

02.2 Count II: Order Prohibiting Contact

There was a restraining order prohibiting Vant from knowingly coming within one mile of Raven Carter or her residence. [RP 12/20/06 10; State’s Exhibit 3]. Carter, Vant’s niece, who testified that on August 29, 2006 she was staying at various locations in addition to keeping her personal property at these locations, had no recollection of staying at her mother’s house at that time. [RP 12/20/06 11-12].

On August 29, 2006, community corrections officers Michael Boone and David Thompson observed Vant on the porch of Carter’s mother’s house. [RP 12/20/06 9, 16, 30].

Vant testified that he had had no contact with his niece Raven after the no-contact order was entered on January 3, 2006, that he was aware that she “moved around” and that he went to his sister’s house on August 29 because his sister told him “to come over and get my clothes washed and get a bath, wash the dogs.” [RP 12/20/06 74-76].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE
THAT VANT COMMITTED THE
OFFENSE OF VIOLATION OF ORDER
PROHIBITING CONTACT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Under RCW 10.99.050, as charged and instructed in this case [CP 8, 25], a person commits the crime of violation of a no-contact order when he or she knows of the existence of the no-contact order and willfully has contact with another person when that contact is prohibited by the no-

contact order. State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596 (2001). Under RCW 10.99.050(2)(a), willful violation of a protection order issued under RCW 10.99.050 is punishable under RCW 26.50.110, and knowledge is a necessary statutory element of violation of a protection order. RCW 26.50.110(1) provides that whenever a protection order is issued under this chapter, “and the respondent or the person to be restrained knows of the order, a violation of the restraint provisions ... is a gross misdemeanor except as provided in subsections (4) and (5) of this section(,)” neither of which is applicable in this case.

In relevant part, the jury was instructed:

To convict the defendant of the crime of violation of order prohibiting contact as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on August 29, 2006, the defendant willfully violated an order prohibiting contact by knowingly coming within one mile of the residence of Raven Carter, the protected party in the order prohibiting contact and/or entering the residence of Raven Carter, the protected party in the order prohibiting contact [Emphasis added];

(2) That such contact was prohibited by a (sic) order prohibiting contact issued by Thurston County Superior Court pursuant to Chapter 10.99 RCW and that the order was in effect;

(3) That the defendant knew of the restraint provisions of the order prohibiting contact....

[CP 25; Court's Instruction 12].

Neither RCW 10.99 nor RCW 26.50 defines "residence." A nontechnical word may be given its dictionary meaning. State v. Ejerme stad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). WEBSTER'S DICTIONARY defines "residence" as:

the act ... of abiding or dwelling in a place for some time: an act of making one's home in a place ...; the place where one actually lives or has his home distinguished from his technical domicile; ... a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1931 (1969).

Under the provisions of the protection order, Vant was not to have any contact with Raven Carter. [State's Exhibit 3]. He didn't. It is not disputed. The same order also prohibited him from entering or coming within "1 mile" of Ms. Carter's residence. No address was listed. [State's Exhibit 3]. The jury was instructed that if Vant, knowing of these provisions, willfully violated the order by knowingly entering or coming within one mile of Ms. Carter's residence, he could be convicted of the offense. [CP 25]. The State failed to carry its burden.

There was no requirement that Vant stay away from Ms. Carter's mother's residence on Steamboat Island Road in Thurston County, where Vant went on August 29, 2006 to see his sister, to get some laundry washed and to take a bath. [RP 12/20/06 75]. Nothing else. Ms. Carter testified that she didn't have a set residence, that she had no recollection of staying at her mother's house on August 29, and that she was staying at various locations in addition to keeping her personal property at these locations. [RP 12/20/06 11-13]. At best she used her mother's house as a mail stop, a "technical domicile," if you will. [RP 12/20/06 13].

Simply, there was no evidence that on August 29, 2006, Ms. Carter was "abiding or dwelling" at her mother's house, that she was "making (her) home" there, that she actually lived there, that it was either her "temporary or permanent dwelling" or that she intended to "return" there. Under these facts, or lack thereof, it cannot be asserted, under any standard, that there was sufficient evidence that on August 29 Ms. Carter's mother's residence on Steamboat Island Road in Thurston County was her, Raven's residence, and, concomitantly, that Vant willfully violated the order of protection by knowingly going to his mother's house on that date. He never knowingly came within one mile or entered Raven Carter's residence.

02. THE TRIAL COURT MISCALCULATED VANT'S OFFENDER SCORE WHEN IT INCLUDED A 1984 U.S.D.C., GEORGIA CONVICTION FOR RAPE WHILE ARMED WITH A DEADLY WEAPON WITHOUT PERFORMING A COMPARABILITY ANALYSIS.

02.1 Procedure

In sentencing Vant, the trial court included his foreign conviction from U.S.D.C., Georgia in determining his offender score:

<u>Crime</u>	<u>Sent. Date</u>	<u>Crime Date</u>	<u>Court</u>
Rape while armed with a deadly weapon	07/27/84	10/24/83	U.S.D.C.. GA

[CP 33].

The trial court calculated Vant's offender score for violation of sex offender registration at "6," attributing "3" points for this prior sex offense conviction. [CP 34, 44].

Defense counsel did not object to the inclusion of this offense in determining Vant's offender score. [RP 01/11/07 5-6].

02.2 Argument

While issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of

an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If Vant's out-of-state conviction was improperly included in his offender calculation, his standard range would drop from 17-22 months to 4-12 months. RCW 9.94A.525(16).

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. When a prior conviction is from out-of-state, the prosecution must prove not only its existence but also that it was "comparable" to a felony in Washington. State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994); RCW 9.94A.525(3). Absent such proof or an affirmative acknowledgment of comparability, the out-of-state conviction may not be used to increase the defendant's offender score. See State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

To properly classify an out-of-state conviction according to Washington law, the sentencing court is required to compare the elements of the foreign conviction with elements of potentially comparable Washington crimes. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements of the out-of-state conviction are substantially similar to the elements of a Washington offense, the out-of-state offense is

legally comparable and properly included in the defendant's criminal history. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). And if the foreign statute is broader than the Washington definition of the particular crime, the sentencing court must determine whether the conduct standing alone would have violated a Washington statute. Id.

A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d 472, 481-82, 973 P.2d 452 (1999). Classification of out-of-state prior convictions is a mandatory step in sentencing proceedings. Ford, 137 Wn.2d at 483. There must be evidence in the record to support both the existence and classification of out-of-state prior convictions. State v. Ford, 137 Wn.2d at 481-82.

02.3 Conclusion

Here, defense counsel did not object to the inclusion of the out-of-state offense in determining Vant's offender score nor affirmatively acknowledge its comparability to a felony in Washington [RP 01/11/07 5-6], no presentence report was ordered [RP 01/11/07 3], the State offered no written documentation nor oral argument pertaining to the comparability of the foreign conviction and the sentencing court, while acknowledging that it didn't "know about the circumstances of (this prior conviction) [RP 01/11/07 8]," did not perform a comparability analysis,

with the result that Vant's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997).

At Vant's sentencing hearing, given that the State presented no evidence on comparability and the trial court rendered no legal comparability ruling, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no "State's case." Nothing occurred that could possibly have warranted an objection from Vant's counsel.

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, "(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no

obligation to object to the State's failure to include the 1985 Kansas theft conviction in his criminal history." Id. at 876.

Here, because Vant was under no obligation to prove the comparability of his foreign conviction – that being the State's exclusive burden – he was under no obligation to object to the State's failure to present any evidence to establish legal and factual comparability nor the trial court's failure to conduct a comparability analysis, and his sentencing should be remanded and the State held to the existing record on remand.

03. THE TRIAL COURT MISCALCULATED VANT'S OFFENDER SCORE WHEN IT INCLUDED HIS TWO ALLEGED PRIOR CRIMINAL CONVICTIONS FOR FELONY SOR VIOLATIONS IN DETERMINING HIS OFFENDER SCORE.

Without objection or acknowledgment, the trial court included Vant's two alleged prior convictions for felony SOR violations in determining his offender score. [RP 01/11/07 4-8; CP 33-34].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the

prior convictions;¹ (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during Vant's sentencing [RP 01/11/07 2-10], the trial court erred in including the two alleged prior convictions for felony SOR violations in determining his offender score. And since, as with the remedy in the preceding section of this brief, supra at 12-13, which is hereby incorporated by reference for the sole purpose of avoiding needless duplication, there was no "State's case" vis-à-vis the two alleged prior SOR violation convictions, and thus nothing warranting an objection from Vant's counsel, Vant's sentencing on this issue should be remanded and the State held to the existing record.

04. THE TRIAL COURT ERRED IN ORDERING VANT TO SUBMIT TO RANDOM URINALYSIS/PBT/BAC PER CCO, NOT TO POSSESS OR PERUSE ANY SEXUAL EXPLICIT IMAGES PER CCO AND TO SUBMIT TO RANDOM POLYGRAPH PER CCO.

At sentencing, as conditions of community custody, the court, in part, ordered that Vant:

[x] Submit to random urinalysis/PBT/BAC

¹ As set forth in the prior section, Vant also had a prior sex offense conviction in the United States District Court of Georgia for rape, which was alleged in the first amended information and which Vant stipulated to at trial. [CP 7; RP 12/20/06 63].

per CCO

- [x] Do not possess/peruse any sexually explicit images per CCO
- [x] Submit to random polygraph per CCO

[CP 36].

A defendant may raise claims relating to sentencing conditions for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003). This court reviews the imposition of community custody conditions for abuse of discretion, reversing only if the decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition is manifestly unreasonable if it is beyond the court's authority to impose. See State v. Jones, 118 Wn. App. a 207-08. When conditions imposed at sentencing do not relate to the circumstances of the crime, such conditions are unlawful. Id.

Here, the condition relating to "random urinalysis/PBT/BAC" testing is not statutorily mandated and not an area of concern with Vant or the nature of his offenses. See RCW 9.94A.715(2)(a). The condition prohibiting the possession or perusal of "any sexually explicit images per CCO" is also misplaced. In State v. Sansone, 127 Wn. App. 630, 638-641, 111 P.3d 1251 (2005), Division I of this court held that a similar

condition² violated due process because it was unconstitutionally vague as applied, and that

(a)lthough delegation to the probation officer or treatment provider to define a term in a community placement condition may be permissible in some circumstances, the vagueness is not cured here.

Sansone, 127 Wn. App. at 634.

And while the terms—“sexually explicit” here; “pornographic” in Sansone—are different, the real point in Sansone was that, given the varying vague definitions of pornography referred to in that case,³ of which “sexually explicit” is but a minor variant, “(t)he fact that one term could be defined so differently indicates the impropriety of delegation....”

Sansone, 127 Wn. App. at 643.

Finally, the trial court abused its discretion in requiring Vant to submit to polygraph testing because the prohibition does not explicitly limit the use of the polygraph to monitoring compliance with the conditions of community supervision and could thus be used to obtain evidence of other crimes. In State v. Flores-Moreno, 72 Wn. App. 733,

² Sansone was “not (to) possesses 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. 642-43.

³ The various definitions given during the proceedings included: ‘naked bodies for the sole purposes of sexual employment’; ‘(a)nything that will cause sexual arousal of a person’; ‘men and women engaging in sex, nudity.... (s)odomy, masturbation.’ Sansone, 127 Wn. App. at 633-34.

746, 866 P.2d 648, review denied, 124 Wn.2d 1009, 879 P.2d 292 (1994), this court held that a condition of community placement that required the defendant to “submit to ... polygraph test at discretion of C.C.O.” was not a crime related prohibition because it required the defendant to submit to a polygraph test “on any and all subjects.” There is no difference here.

05. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and “that a defendant cannot agree to punishment in excess of that which the Legislature has established.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004)(the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Vant to 18 months for violation of sex offender registration, the trial court imposed 36 to 48 months’ community custody. [CP 37-38]. As this sentence exceeds the statutory maximum

sentence of five years imprisonment, or a \$10,000 fine, or both, See RCW 9A.44.130; RCW 9A.20.021(1)(c), this court should remand for resentencing within the five-year statutory maximum for violation of sex offender registration, a class C felony.

E. CONCLUSION

Based on the above, Vant respectfully requests this court to reverse and dismiss his conviction for violation of order prohibiting contact and to remand for resentencing consistent with the arguments presented herein.

DATED this 28th day of February 2007.

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CERTIFICATE

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