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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the defendant. Where additional information is needed, it will be set forth in the argument section.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the conviction for the statutory enhancement of committing the crime of Possession of Methamphetamine in a County Jail violated his constitutional rights and the trial court erred in denying his motion to dismiss the enhancement.

The defendant was charged in Count 2 with Possession of Controlled Substance – Methamphetamine (Amended Information (CP 3)). A jury convicted the defendant. As part of count 2, the jury was asked, by special verdict, whether or not the defendant possessed the controlled substance – methamphetamine, in a county jail and, separately, if he committed the current offense shortly after being released from incarceration. The jury responded in the affirmative. (Special Verdicts, Count 2 (CP 60 and 61)).

The jury instructions given to the jury (CP 27) included as Instruction No. 13 the elements of conviction of a Possession of a Controlled Substance. The instruction reads as follows:

To convict the defendant of the crime of possession of a controlled substance, as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 24<sup>th</sup> day of February, 2006, the defendant possessed a controlled substance; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The enhancement to this particular crime is found, as part of, RCW 9.94A.533(5)(c) and provides as follows:

(5) the following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. . . .

(c) twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

RCW 9.94A.533(5)(c)(in part)

If the language of a statute is clear and unambiguous, the appellate court applies the statute as written and assumes that the legislature means exactly what it says. In Re Custody of Smith, 137 Wn.2d 1, 8-9, 969 P.2d 21 (1998); State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). Statutes must be read to avoid absurd and strained interpretations. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). In interpreting a statute, the appellate court's primary objective is to ascertain and give effect to the drafters' intent. When that language is clear, the courts cannot construe a statute contrary to its plain language. Simmerly v. McKee, 120 Wn. App. 217, 221, 84 P.3d 919 (2004); City of Kirkland v. Ellis, 82 Wn. App. 819, 826, 920 P.2d 206 (1996).

In our situation, the crime is possession of the controlled substance. The active component of that crime is the possession of the illicit drugs, whether actual or constructive. There are no definitions for intent or knowledge in the particular statute. Thus, the active crime is possessing of the drugs. If those drugs are possessed in an inappropriate area, then the jury is asked whether or not the State has proven beyond a reasonable doubt, an additional penalty element of the activity.

Defendant's argument appears to be similar to numerous previous challenges to the validity of the school zone/school bus stop enhancements under RCW 69.50.435. Arguments challenging the statute's

constitutionality (on both due process and equal protection grounds) have been repeatedly rejected. See State v. Johnson, 116 Wn. App. 851, 68 P.3d 290, *review denied*, 150 Wn.2d 1021 (2003); State v. Sanchez, 104 Wn. App. 976, 17 P.3d 1275 (2001); State v. Davis, 93 Wn. App. 648, 970 P.2d 336, *review denied*, 137 Wn.2d 1037 (1999); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992).

Equally unavailing is defendant's argument that the jail enhancement lacked a mens rea element. As our appellate courts have held, there is no mens rea element in the 24-month public park sentence enhancement under RCW 69.50.435. State v. Carter, 64 Wn. App. 90, 92-93, 823 P.2d 523 (1992). Furthermore, "the Legislature has the power to define a crime as conduct alone, without any mental element." Id (*citing State v. Abbott*, 45 Wn. App. 330, 332, 726 P.2d 988 (1986), *review denied*, 107 Wn.2d 1027 (1987)). Finally, the crime of straight or simple possession of a controlled substance is strict a liability crime, requiring no intent element. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999) (*citing State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994)).

Similar to the school zone/school bus stop/public park protected area line of cases, there is no mens rea element required for a jail enhancement. The mens rea, or mental element, required pertains to the

underlying crime. For example, in the prosecution for the crime of delivery of a controlled substance, the State must prove that the defendant knew that the substance he delivered was a controlled substance. If the location of the delivery occurred inside a protected zone (on school grounds, in a public park, etc), and one of the 24-month enhancements applies, the State is not required to prove that the defendant knew or had knowledge that he committed the crime inside a protected zone.

Another similar scenario is where the police conduct a traffic stop on a defendant while he was driving a vehicle, and in the course of the investigation, the defendant is arrested and charged with possession of a controlled substance with intent to deliver. The location of the traffic stop happens to be located within a protected zone. The defendant in this scenario could certainly argue that he should not be subject to the enhancement, since he did not select the location of the traffic stop. And the argument would fail, because both his lack of knowledge of the location of the protected zones and his lack of control for the location of the traffic stop are irrelevant when it comes to the enhancement. What is relevant, is act of committing the crime.

In the present case, the relevant issue is whether defendant possessed the methamphetamine that he was charged with possessing.

And since simple possession of a controlled substance is a strict liability crime, there is no mens rea element required.

The defendant attempts to analogize our penalty enhancement statutes with statutes from at least four other states. As he sets forth this deals with “Tippetts, Gastello, Cole, and Sowry”. (Brief of Appellant, page 16). The State submits that all of this case law is clearly distinguishable from the situation that we have.

The defendant cites to the Oregon case of State v. Tippetts, 180 Or. App. 350, 43 P.3d 455 (2002). However the active elements of the crime Mr. Tippetts was convicted of in Oregon was not a mere possession of controlled substance with a penalty enhancement, but was actually supplying contraband into a jail. The Oregon statute involved is ORS 162.185 which reads as follows:

A person commits the crime of supplying contraband if:  
(a) the person knowingly introduces any contraband into a correctional facility, youth correction facility or state hospital; or (b) being confined in a correctional facility, youth correction facility or state hospital, the person knowingly makes, obtains or possesses any contraband.

The Oregon statute in question requires the element of knowledge where the jail enhancement in the State of Washington does not. Further, the Oregon crime appears to require that the person must be “confined in a correctional facility” to make possession unlawful, while the Washington

jail enhancement simply requires that the person commit one of the applicable crimes “while in a county jail or state correctional facility.” Finally, the Oregon statute is located in Chapter 162 of the Oregon Revised Statutes which is listed as “Offenses Against the State and the Public Justice.” The particular subsection where the crime supplying contraband is located is titled “Escape, Supplying Contraband, and Failure to Appear.” Oregon does not have a jail enhancement similar to Washington.

The defendant also relies on People v. Gastello, 57 Cal. Rptr. 3d 293, \_\_\_ P.3d \_\_\_ (2007). The California case dealt with a person who was arrested and taken directly to jail for being under the influence. On the cursory search in the field no weapons or obvious contraband were found. At the time that he is booked into the jail, and instructed to empty his pockets, he revealed that he had a baggie of meth.

The specific statute that was used in that case was under California Penal Code Section 4573 which reads, in pertinent part, as follow:

Except when otherwise authorized . . . any person who, knowingly brings or sends into, or knowingly assists in bringing into, sending into, any state prison . . . or into any county . . . jail . . . any controlled substance . . . is guilty of a felony.

Again, that particular case is a knowing introduction of contraband into the jail. This is not a penalty enhancement statute nor did this case

have anything to do with the type of statutory scheme we have in the State of Washington.

The defendant relies on New Mexico v. Cole, 2007 N.M.C.A. 99, 164 P.3d 1024 (2007). The defendant was arrested in that case, brought into the jail setting where controlled substances were found on his person. Again, the statutory scheme in New Mexico under which the defendant was prosecuted is dealing with contraband.

New Mexico Statute § 30-22-14 reads as follows:

§ 30-22-14. Bringing contraband into places of imprisonment; penalties; definitions

A. Bringing contraband into a prison consists of carrying, transporting or depositing contraband onto the grounds of the penitentiary of New Mexico or any other institution designated by the corrections commission (corrections industries commission) for the confinement of adult prisoners. Whoever commits bringing contraband into a prison is guilty of a third degree felony.

B. Bringing contraband into a jail consists of carrying contraband into the confines of a county or municipal jail. Whoever commits bringing contraband into a jail is guilty of a fourth degree felony.

C. As used in this section, “contraband” means:

(1) any deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of his duties;

(2) currency brought onto the grounds of the institution for the purpose of transfer to a prisoner, but does not include currency carried into areas designated by the warden as areas for the deposit and receipt of currency for credit to a prisoner's account before contact is made with any prisoner;

(3) any alcoholic beverage; or

(4) any controlled substance, as defined in the Controlled Substances Act [30-31-1- NMSA 1978], but does not include a controlled substance carried into a prison through regular prison channels and pursuant to the direction or prescription of a regularly licensed physician.

N.M. Stat. Ann. § 30-22-14

Again, as in the two previous cases, this is a crime of knowingly bringing contraband into a correctional facility. It is not an enhancement statute. Finally, the defendant relies on the Ohio case of State v. Sowry, 155 Oh. App.3d 742, 803 N.E.2d 867 (2004). Again, as in the previous cases, this is a case dealing with introduction of contraband into a jail.

The applicable Ohio statute is ORC Ann. §2921.36 which reads as follows:

§ 2921.36 Illegal conveyance of weapons or prohibited items onto grounds of detention facility or institution

(A) No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution that is under the control of the department of mental health or the department of mental retardation and development disabilities, any of the following items;

(1) Any deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, or any part of or ammunition for use in such a deadly weapon or dangerous ordnance;

(2) Any drug of abuse, as defined in section 3719.011 [3719.01.1] of the Revised Code;

This also is a statute punishing knowingly introducing contraband into a detention facility. It is not an enhancement statute.

The State submits that in all four instances knowledge is required because these are introductions of contraband into a facility. The crime is not the mere possession of the object but the bringing or the introduction of the object into a prohibited area. This is a totally different statutory scheme than we have in the State of Washington. The active elements of our crime deal with possession of controlled substance, not with knowing introduction of contraband into a detention facility. These cases are clearly distinguishable.

### III. RESPONSE TO ASSIGNMENTS OF ERROR NO. 2 AND 3

The second and third assignments of error deal specifically with a provision in the Judgment and Sentence (CP 101) which indicates as follows:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, papers,

police scanners, and hand held electronic scheduling and data storage devices.

(Judgment and Sentence, CP 101, page 8)

The defendant maintains that this particular provision of the defendant's sentence is "hopelessly vague". (Brief of Appellant, page 20). Further, he maintains that this matter should be heard at this time and is ripe for decision.

A statute or condition is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The appellate court presumes that statutes are constitutional and the defendant has a heavy burden of proving that a statute is unconstitutional beyond a reasonable doubt. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). The fact that some terms in a statute are not defined does not necessarily mean the statute or condition is void for vagueness. Douglass, 115 Wn.2d at 180. Impossible standards of specificity are not required, and a statute "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988).

The State submits that this identical argument and claim was raised recently in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007). In the Motter case, the defendant challenged the identical provision of his judgment and sentence. He attacked it for vagueness and for the reasons also raised in this appeal. Division II, in the Motter, case, indicated as follows:

B. Prohibition on Paraphernalia Possession and Use

Second, Motter challenges the trial court's order that he: shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices. CP at 149. This condition does not order affirmative conduct. And, as demonstrated above, Motter's crime was related to his substance abuse. Thus, forbidding Motter from possessing or using controlled substance paraphernalia is a "crime-related prohibition" authorized under RCW 9.94A.700(5)(e). Thus, this condition is valid.

Motter argues that "almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils." Br. of Appellant at 29. A community custody condition may be void for vagueness if it fails to define specifically the activity that it prohibits. State v. Riles, 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998). But Motter fails to cite to authority and his argument consists of one unhelpful sentence in the context of a complex constitutional legal doctrine.

Moreover, Motter's challenge is not ripe. In State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the

defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in State v. Langland, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from "pop" cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

- Motter, 139 Wn. App. at 804.

The State submits that nothing has been added in this brief to undermine that Motter determination.

Finally, the defendant maintains that under the WAC provisions that this matter would not come back before the court nor would there be an opportunity for review of the conditions once they do become "ripe". However, the State would submit that since this matter is not ripe at this time, that when it becomes ripe, the defendant would have the opportunity to file a personal restraint petition or seek some type of other relief at that time. It would not make any sense to forestall him at that point from raising it.

A petitioner who has had no previous or alternative avenue for obtaining state judicial review need only satisfy the requirements under RAP 16.4. E.g., In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994) (a personal restraint petition (PRP) challenging a decision of the Indeterminate Sentence Review Board concerning parole need not meet the threshold requirements for constitutional and nonconstitutional errors because the policy of finality underlying those requirements is absent where the prisoner has had no previous or alternative avenue for obtaining state judicial review of the board decision); see also In re Pers. Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995).

The State submits that Motter is the controlling case law and should be applied in this circumstance.

#### IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 17 day of December, 2007.

Respectfully submitted:

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