

FILLED  
COURT OF APPEALS  
DIVISION II

00 JUN -9 AM 11:48

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

NO. 37024-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

RANDY K. ERWIN,

Appellant.

---

BRIEF OF APPELLANT

---

John A. Hays, No. 16654  
Attorney for Appellant

1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084

 ORIGINAL

*pm 6/6/08*

**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	2
C. STATEMENT OF THE CASE	
1. Factual History .....	3
2. Procedural History .....	5
D. ARGUMENT	
<b>I. THE TRIAL COURT VIOLATED THE DEFENDANT'S     RIGHT TO DUE PROCESS UNDER WASHINGTON     CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES     CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT     ENTERED JUDGEMENT AGAINST HIM FOR     POSSESSION OF METHAMPHETAMINE WITH INTENT     TO DELIVER BECAUSE SUBSTANTIAL EVIDENCE DOES     NOT SUPPORT THIS CONVICTION .....</b>	<b>7</b>
<b>II. THE TRIAL COURT ERRED WHEN IT IMPOSED A     COMMUNITY CUSTODY CONDITION THAT WAS NOT     AUTHORIZED BY THE LEGISLATURE, AND THAT WAS     SO VAGUE THAT IT VIOLATED THE DEFENDANT'S     RIGHT TO DUE PROCESS UNDER WASHINGTON     CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES     CONSTITUTION, FOURTEENTH AMENDMENT .....</b>	<b>13</b>
E. CONCLUSION .....	21

F. APPENDIX

1. Washington Constitution, Article 1, § 3 .....	22
2. Washington Constitution, Article 1, § 22 .....	22
3. United States Constitution, Fourteenth Amendment .....	22
4. WAC 137-104-050 .....	23
5. WAC 137-104-080 .....	23

## TABLE OF AUTHORITIES

Page

### *Federal Cases*

<i>Douglas v. California</i> , 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) . . . . .	17
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) . . . . .	7
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) . . . . .	8
<i>Rheurark v. Shaw</i> , 628 F.2d 297, 302 (5th Cir.1980), <i>cert. denied</i> , 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981) . . . . .	17

### *State Cases*

<i>In re Frampton</i> , 45 Wn.App. 554, 726 P.2d 486 (1986) . . . . .	17
<i>In re Messmer</i> , 52 Wn.2d 510, 326 P.2d 1004 (1958) . . . . .	18
<i>State v. Aver</i> , 109 Wn.2d 303, 745 P.2d 479 (1987) . . . . .	13, 14
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) . . . . .	7
<i>State v. Brown</i> , 68 Wn.App. 480, 843 P.2d 1098 (1993) . . . . .	9
<i>State v. Davis</i> , 79 Wn.App. 591, 904 P.2d 306 (1995) . . . . .	9, 11, 12
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006) . . . . .	17
<i>State v. Hutchins</i> , 73 Wn.App. 211, 868 P.2d 196 (1994) . . . . .	9
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974) . . . . .	8
<i>State v. Lopez</i> , 79 Wn.App. 755, 904 P.2d 1179 (1995) . . . . .	9

<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972) .....	7
<i>State v. Motter</i> , 139 Wn.App. 737, 162 P.3d 1190 (2007) .....	16, 18, 20
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987) .....	17
<i>State v. Rutherford</i> , 63 Wn.2d 949, 389 P.2d 895 (1964) .....	17
<i>State v. Simpson</i> , 136 Wn.App. 812, 150 P.3d 1167 (2007) .....	13
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973) .....	8
<i>State v. Worrell</i> , 111 Wn.2d 537, 761 P.2d 56 (1988) .....	13

***Constitutional Provisions***

Washington Constitution, Article 1, § 22 .....	16, 17
Washington Constitution, Article 1, § 3 .....	7, 13, 15-17, 20
United States Constitution, Fourteenth Amendment .....	7, 13, 16, 17, 20

***Statutes and Administrative Codes***

RAP 2.2 .....	17
WAC 137-104-050 .....	19
WAC 137-104-080 .....	19, 20

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him for an offense unsupported by substantial evidence.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it imposed a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited.

3. This court's refusal to address argument II as not ripe will violate the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22.

*Issues Pertaining to Assignment of Error*

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment against that defendant for an offense unsupported by substantial evidence?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if it imposes a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited?

3. Does the court of appeals' refusal to address a constitutional challenge to a community custody condition as not ripe for adjudication violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22?

## STATEMENT OF THE CASE

### *Factual History*

On April 4, 2007, Vancouver Police Officer Troy Rawlins was on duty in the City of Vancouver when he saw the defendant driving a 1994 S10 Blazer near a motel located close to the Vancouver Mall. RP 10-13, 155-157. An adult female was in the front seat. RP 10-13. When the defendant made a turn without signaling, Officer Rawlins pulled in behind the defendant and turned on his overhead lights. *Id.* After the vehicles stopped, Officer Rawlins approached the Blazer and asked the defendant for identification, which he produced. RP 13-14. Officer Rawlins then ran the defendant's name and discovered that he had an outstanding warrant. *Id.* At this point, Officer Rawlins called for backup as he intended to arrest the defendant. *Id.*

Once a backup unit arrived, Officer Rawlins ordered the defendant out of the Blazer, put him in handcuffs, and arrested him on the outstanding warrant. RP 13-15. After placing the defendant in cuffs, Officer Rawlins searched the defendant's person, finding a small set of scales and a gold coin in his coat pocket. RP 15-18. Once he had the defendant placed in the back of his patrol car, Officer Rawlins returned to search the Blazer. RP 18-20. As he did so, the cover officer had the female passenger exit the vehicle. RP 55-58.

At about this time, a person by the name of William Abernathy came

out of the motel and approached the officers. RP 36-37, 60-64, 155-157. He explained that the Blazer belonged to his step-daughter and that the previous evening he had driven the vehicle from his home town of Puyallup to Vancouver with the defendant as a passenger. *Id.* He also stated that he had allowed the defendant to drive the Blazer once they arrived in Vancouver, and that the defendant had gone to pick up the woman who was then in the passenger side of the vehicle. RP 155-159. After the defendant had picked her up, Mr. Abernathy had seen her smoking Camel cigarettes. RP 157-158.

During the search of the vehicle, Officer Rawlins found a leather coin bag inside the center console between the two front seats. RP 18-20. Inside the bag, he found the following items: a short plastic straw; a small measuring spoon; two plastic bags containing under 40 grams of green, leafy vegetable material; 11 small plastic bags with white crystalline substance in them of weights from .3 and 1.2 grams; a plastic bag with approximately 21 grams of white crystalline substance; and empty plastic bags. RP 18-28. Officer Rawlins also found a Camel cigarette "hardpack" stuffed down between the driver's seat and the center console. RP 18-20, 30-31. Inside this container, Officer Rawlins found a small baggie with 1.6 grams of white crystalline substance in it along with cigarettes. *Id.*

After Officer Rawlins finished his search, he went to the defendant, read him his *Miranda* rights, and asked him about the items he had found.

RP 34-35. The defendant responded that he bought and sold gold coins and that he kept the scales for weighing those coins. RP 34-35, 42-43. The defendant denied even knowing that any of the other items were present in the Blazer. RP 34-35, 42-43.

Officer Rawlins later sent all of the items he found to the Washington State Patrol Crime Lab for analysis. RP 32. These tests showed that (1) the 21 gram bag of white crystalline substance “contained methamphetamine,” (2) one of the eleven bags of white crystalline substances “contained methamphetamine”, (3) the small baggie of white crystalline substance from the cigarette pack also “contained methamphetamine.” RP 77-78, 83-89. The lab also tested the scales found in the defendant’s pocket and found that while the top of the scale did not have anything on it, there were small “bits” of methamphetamine down in the crevices of the scales. RP 86-89. In addition, a technician for the Vancouver Police Department tested the green leafy material found in the leather bag and determined that it was marijuana. RP 139-148.

### **Procedural History**

By amended information filed April 6, 2007, the Clark County Prosecutor charged defendant Randy Kevin Erwin with one count of possession of methamphetamine with intent to deliver, one count of possession of under 40 grams of marijuana, and one count of use of drug

paraphrenalia. CP 13-14. The case later came to trial before a jury with the state calling five witnesses, including Officer Troy Rawlins. RP i. The defendant then called Mr. Abernathy. RP 155. These witnesses testified to the facts contained in the preceding *Factual History*. See *Factual History*.

Following the close of the defendant's case, the court dismissed Count III upon the defendant's motion. RP 149-152. The court then instructed the jury with neither side making any objections or taking any exceptions. RP 170. After argument by counsel, the jury retired for deliberation, eventually returning verdicts of guilty on Counts I and II. CP 49-50.

At a later date, the court sentenced the defendant to 90 months in prison which was within the standard range on Count I. CP 62-90. The court imposed 90 days in jail on count II. CP 62-80. The court also imposed from 9 to 12 months community custody on Count I. CP 67-71. This term of community custody included the following condition, among others:

- ☒ 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, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 69.

After imposition of sentence, the defendant filed timely notice of appeal. CP 85.

**BRIEF OF APPELLANT - 6**

## ARGUMENT

### I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR POSSESSION OF METHAMPHETAMINE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CONVICTION.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant with possession of methamphetamine with intent to deliver. Specifically, the state alleged that the defendant possessed the methamphetamine the officer found in the leather bag and the cigarette box and that he did so with the intent to deliver that methamphetamine to another person. Thus, In order to sustain a conviction on this charge, the state had the burden of presenting substantial evidence both that the defendant actually possessed thier items, and that he did so with the intent to deliver it.

As a general proposition, substantial evidence of a specific criminal intent exists when the evidence supports a logical probability that the defendant acted with the requisite intent. *State v. Stearns*, 61 Wn.App. 224, 228, 810 P.2d 41 (1991). However, evidence of the specific intent to deliver a controlled substance must be compelling. *State v. Davis*, 79 Wn.App. 591, 594, 904 P.2d 306 (1995). Mere possession of a controlled substance even in large amounts is insufficient alone to establish an inference of intent to deliver. *State v. Lopez*, 79 Wn.App. 755, 768, 904 P.2d 1179 (1995). Rather, there must be compelling other evidence that supports the inference of the intent to deliver in order that most possessions of controlled substances are not improperly turned into possessions with intent to deliver without substantial evidence as to the possessor's intent, above and beyond the possession itself. *State v. Hutchins*, 73 Wn.App. 211, 217, 868 P.2d 196 (1994). Finally, as the court stated in *State v. Brown*, 68 Wn.App. 480, 485, 843 P.2d 1098 (1993), "[c]onvictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession").

For example, in *State v. Davis, supra*, the sought relief from personal restraint following his conviction for possession of marijuana with intent to deliver arguing that substantial evidence did not support his conviction. At trial, the state had presented evidence that at the time of his arrest, the

defendant possessed a bread sack with six individually wrapped baggies of marijuana, two baggies of marijuana seeds, a film canister containing marijuana, a baggie with marijuana residue in it, a box of sandwich baggies, a pipe used for smoking marijuana, a number of knives. In addition, at trial the state presented the testimony of a police officer that it was not customary for people who simply use marijuana to have that “quantity with that packaging.” The state argued that the items the defendant possessed, particularly the amount of marijuana in conjunction with the packaging materials and the testimony of the officer constituted substantial evidence of an intent to deliver.

In addressing these arguments, the court first noted the following concerning the quantum and type of evidence necessary to sustain an inference of intent to deliver. The court states:

Convictions for possession with intent to deliver are highly fact specific. Certainly, an intent to deliver might be inferred from an exchange or possession of significant amounts of drugs or money. And there are also a variety of other circumstances which, taken together with possession of a controlled substance, lead to the conclusion that possession was with the intent to deliver.

In Kovac, officers seized seven baggies containing a total of eight grams of marijuana from the defendant. We held the evidence insufficient to justify an inference of intent to deliver. In Hutchins, police seized in excess of 40 grams of marijuana and charged the defendant with possession with intent to deliver. A police officer testified at trial about the “normal quantity” of marijuana seized in an arrest. We held that “[a]n officer’s opinion of the quantity of a controlled substance normal for personal use is insufficient to

establish, beyond a reasonable doubt, that a defendant possessed the controlled substance with an intent to deliver.”

*State v. Davis*, 79 Wn.App. at 594-595 (citations omitted).

After this review, the court reviewed the evidence presented at trial and came to the conclusions that it did not constitute substantial evidence of an intent to deliver. The court held as follows:

Here, police discovered six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. No quantity of money was found nor were any weighing devices. The seeds might well suggest an intent to grow marijuana. But there was no evidence Mr. Davis had bought or sold marijuana or was in the business of buying or selling. The marijuana totaled 19 grams, an amount which could certainly be consumed in the course of normal personal use. The packaging likewise is not inconsistent with personal use. There is not enough evidence before us to infer the specific criminal intent to deliver required by the statute. Intent to deliver does not follow as a matter of logical probability.

*State v. Davis*, 79 Wn.App. at 595-596 (citations omitted).

In the case at bar, the police seized the following items from the vehicle the defendant was driving: a short plastic straw; a small measuring spoon; two plastic bags containing under 40 grams of marijuana; 11 small plastic bags with white crystalline substance in them of weights from .3 and 1.2 grams, one of which was confirmed to contain methamphetamine; a plastic bag with approximately 21 grams of white crystalline substance containing methamphetamine; empty plastic bags, and a Camel cigarette “hardpack” with 1.6 grams of methamphetamine in it along with cigarettes.

The police also seized a small scale from the defendant's person along with a gold coin.

However, in the case at bar, the police did not find money in any quantity, they did not find any cell phones, and they did not find any buy and owe sheets. Neither did they see any actions by the defendant or the vehicle indicating the processes involved in delivering or preparing to deliver controlled substances. Finally, the defendant did not appear either nervous, non-cooperative, or affected by the use of drugs. Under this facts, the record contains no more evidence of an intent to deliver that existed in *State v. Davis*. Thus, in the same manner that substantial evidence did not support the inference in *Davis* that the defendant possessed a controlled substance with the intent to deliver, so substantial evidence does not support the inference in the case at bar that the defendant possess a controlled substance with the intent to deliver. As a result, this court should reverse the defendant's convictions and remand with instructions to enter judgement for the lesser included offense of possession of methamphetamine.

**II. THE TRIAL COURT ERRED WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION THAT WAS NOT AUTHORIZED BY THE LEGISLATURE, AND THAT WAS SO VAGUE THAT IT VIOLATED THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, “a statute is void for vagueness if its terms are ‘so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.’” *State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm’rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, which had the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn.App. 812, 150 P.3d 1167 (2007).

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional

unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

*State v. Aver*, 109 Wn.2d at 306-07.

In the case at bar the defendant argues that the following community custody condition the court imposed in this case violates due process because it is void for vagueness.

- ☒ 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, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 69.

In this provision the phrase “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” is hopelessly vague. Literally, any item from a toothpick up to a dump truck could qualify under this phrase. The following gives a few examples. All types of telephones can and are used to facilitate the transfer of drugs. Is the defendant prohibited

from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the defendant prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is the defendant prohibited from using a blender? Matches are often used as a source of phosphorous in the manufacture of methamphetamine. Is the defendant prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. Is the defendant prohibited from possessing cigarette paper? Baggies are often used to contain controlled substances. Is the defendant now forced to only use waxed paper to wrap his sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps the defendant will be in violation if he possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase "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" is so vague as to leave the defendant open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

In a recent decision, this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not

sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In *State v. Motter*, 139 Wn.App. 737, 162 P.3d 1190 (2007), this court held:

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.

*State v. Motter*, No. 34251-2-II (filed 7-24-05)

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar this court did then and would now violate the defendant's right to procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule, the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington, a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the

opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

*In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what

the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104, to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court. This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer

within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

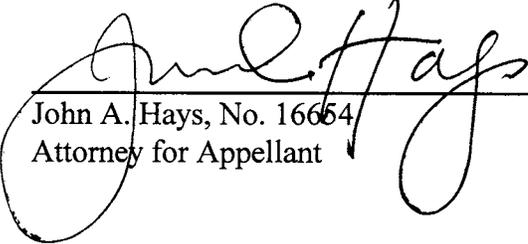
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refusing to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

## CONCLUSION

Substantial evidence does not support the charge for which the defendant was convicted. As result, this court should vacate the conviction and remand with instructions to enter judgment on the lesser included offense of possession of methamphetamine. In addition, this court should vacate the community custody condition that is unconstitutionally vague.

DATED this 6th day of June, 2008.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**WAC 137-104-050**

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

**WAC 137-104-080**

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUN -9 AM 11:48  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,  
Respondent,  
vs.  
ERWIN, Randy K.  
Appellant

CLARK CO. NO: 007-1-00614-1  
APPEAL NO: 37024-7-II  
AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
COUNTY OF CLARK ) vs.

CATHY RUSSELL, being duly sworn on oath, states that on the 6<sup>TH</sup> day of JUNE, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS  
PROSECUTING ATTORNEY  
1200 FRANKLIN ST.  
VANCOUVER, WA 98668

RANDY K. ERWIN #915108  
WASH STATE CORRECTION CTR.  
P.O. BOX 900  
SHELTON, WA 98584

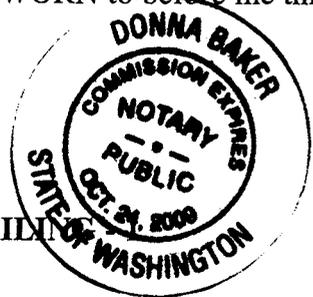
and that said envelope contained the following:  
1. BRIEF OF APPELLANT  
2. AFFIDAVIT OF MAILING

DATED this 6<sup>TH</sup> day of JUNE, 2008.

[Signature]  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of JUNE, 2008.

[Signature]  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 16-24-09



AFFIDAVIT OF MAILING

John A. Hays  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084