

NO. 38201-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ALLEN ROSARIO,

Appellant.

BY  DEPUTY
STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Rosanne Buckner, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTSI

TABLE OF AUTHORITIES II

A. ASSIGNMENT OF ERROR..... 1

 ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

B. STATEMENT OF THE CASE..... 1

 1. PROCEDURAL HISTORY 1

 2. SUBSTANTIVE FACTS 2

C. ARGUMENT..... 3

 THE NO CONTACT PROVISION IN THE JUDGMENT AND
 SENTENCE MUST BE CORRECTED TO IDENTIFY WITH
 CERTAINTY THE PARTY ROSARIO IS PROHIBITED FROM
 CONTACTING..... 3

D. CONCLUSION 5

TABLE OF AUTHORITIES

Washington Cases

<u>Grant v. Smith</u> , 24 Wn.2d 839, 167 P.2d 123 (1946).....	4
<u>Spokane v. Douglass</u> , 115 Wn.2d 171, 795 P.2d 693 (1990)	3
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	3
<u>State v. Jones</u> , 93 Wn. App. 14, 968 P.2d 2 (1998).....	4

Statutes

RCW 9.94A.030(13).....	3
RCW 9.94A.505(8).....	3
RCW 9.94A.634.....	3

A. ASSIGNMENT OF ERROR

The no contact provision of the judgment and sentence fails to identify with certainty the party appellant is prohibited from contacting.

Issue pertaining to assignment of error

Appellant entered an *Alford* plea to one count of second degree robbery. The charging document identified the victim in the case as Young Lee, while the probable cause declaration, which provided the factual basis for the plea, identified the Burger Castle restaurant as the victim. In the judgment and sentence, the court ordered appellant to have no contact with the victim without specifically identifying that party. Given the inconsistencies in the documents supporting the judgment and sentence, is remand required to clarify the court's order?

B. STATEMENT OF THE CASE

1. Procedural History

On June 5, 2008, the Pierce County Prosecuting Attorney charged appellant Joseph Rosario with one count of first degree robbery. CP 1. The charge was amended to second degree robbery, and Rosario entered an *Alford* plea. CP 3, 5-13. The Honorable Rosanne Buckner imposed a standard range sentence of 33 months confinement plus 18 to 36 months community custody, and Rosario filed this timely appeal. CP 21-22, 29.

2. Substantive Facts

The amended information in this case charged Joseph Rosario with second degree robbery as follows:

That JOSEPH ALLEN ROSARIO, in the State of Washington, on or about the 4th day of June, 2008, did unlawfully and feloniously take personal property belonging to another with intent to steal from the person or in the presence of Young Lee, the owner thereof or a person having dominion and control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to Young Lee, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking, contrary to RCW 9A.56.190 and 9A.56.210, and against the peace and dignity of the State of Washington.

CP 3.

In his guilty plea statement, Rosario acknowledged he was charged with robbery in the second degree as follows:

On 6-4-08 in Pierce County, WA, defendant did unlawfully & feloniously take personal property belonging to another with intent to steal from the person or in the presence of Young Lee, the owner thereof or having dominion & control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to Young Lee.

CP 5.

Rosario entered an *Alford* plea and agreed that the court could review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. CP 12. Unlike the amended information and the statement on plea of guilty, the declaration

for determination of probable cause does not refer to Young Lee but instead identifies the Burger Castle restaurant at 5013 So. 56th in Tacoma as the victim. CP 2.

The court accepted Rosario's plea and ordered the recommended low-end standard range term of confinement plus 18 to 36 months of community custody. CP 21-22; RP¹ 8. The court ordered as a condition of community custody that Rosario have no contact with "victim(s)." CP 23.

C. ARGUMENT

THE NO CONTACT PROVISION IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED TO IDENTIFY WITH CERTAINTY THE PARTY ROSARIO IS PROHIBITED FROM CONTACTING.

As part of any sentence, a court may impose a no contact order directly related to the circumstances of the crime. RCW 9.94A.030(13); RCW 9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). Violation of any condition of a sentence subjects the violator to further punishment. See RCW 9.94A.634. Thus, due process requires that defendants receive adequate warning of proscribed conduct. See Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

¹ The Verbatim Report of Proceedings from the July 24, 2008, plea and sentencing hearing is designated RP.

In setting forth conditions of community custody, the court below ordered Rosario to have no contact with the “victim(s)” in this case, but no victim is specifically identified. CP 23. While in some cases such an order might be sufficient, the conflicting language in the documents supporting Rosario’s plea and sentence renders the court’s order in this case insufficiently specific.

Rosario was charged with robbing Young Lee. CP 3. He acknowledged that charge in his guilty plea statement. CP 5. The declaration for determination of probable cause, on the other hand, identified the Burger Castle restaurant at 5013 So. 56th in Tacoma as the victim. CP 2. While Rosario pleaded guilty to second degree robbery as charged in the amended information, the court accepted his plea based on the facts set forth in the probable cause statement. CP 12, 18. Given this inconsistency, the court’s order to have no contact with “victim(s)” does not adequately inform Rosario of the prohibited conduct, and he could not be certain whether he was in violation of the no contact order. The order therefore does not afford Rosario due process.

A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). When a sentence containing community custody requirements is insufficiently specific, the appropriate remedy is remand so

that the judgment and sentence may be corrected. Id. at 19 (judgment and sentence insufficiently specific as to term of community placement). Under the circumstances here, the no contact provision in the judgment and sentence fails to identify with certainty the party Rosario is prohibited from contacting. The judgment and sentence must be corrected to remedy this error.

D. CONCLUSION

The no contact provision of the judgment and sentence is insufficiently specific to advise Rosario of the conduct prohibited. This Court should remand for correction of this error.

DATED this 23rd day of January, 2009.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Joseph Rosario*, Cause No. 38201-6-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 23, 2009

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