

COURT OF APPEALS
DIVISION II

NO. 38565-1-II

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

STATE PROSECUTOR
BY _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

AZAEL ORTIZ LOPEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-00710-3

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

By Amended Information (CP 5), the defendant was charged with Delivery of a Controlled Substance – Methamphetamine. The crime allegedly occurred on or about February 20, 2008. The police were responding to tips from a confidential informant.

The defendant was convicted at Bench Trial on October 27, 2008. He was sentenced on November 13, 2008. (Felony Judgment and Sentence – Prison – Community Placement/Community Custody) (CP 6). One of the conditions of the Judgment and Sentence, on page 8, reads 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 substance including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

- (CP 6, Page 8)

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant in this case is that the provision quoted above is not crime related to his conviction and is unconstitutionally vague. Further, that this matter is ripe for review and should be available to be challenged for the first time on appeal.

One of the witnesses called by the State in the Bench Trial, in its case-in-chief, was Bethaney Graves, who works as a Community Corrections Officer for Washington State Department of Corrections and is also involved in the neighborhood response team. The duties of members of that team include investigations, serving search warrants, drug buys, working with informants and other activities of that nature.

(RP 117).

On questioning by the Deputy Prosecutor, the witness indicated as follows:

Q (Deputy Prosecutor): Can you tell us the nature of that investigation?

A (Bethaney Graves): Yes. My assignment was to work undercover with Officer Brian Billingsley, and we were going to go into an informant's residence and witness a drug transaction take place inside the informant's residence.

Q Do you initially know who the target of your investigation was?

A Yes. I believe - - I just knew that it was a man - - a gentleman who went by the name of Jose.

Q Okay. Do you recall how your target was contacted?

A Yes. The informant made several telephone calls to the target.

Q Okay. Did you listen to the informant's end of those telephone conversations?

A Yes, I did.

Q Okay. Did the informant specifically ask for drugs?

A Yes

Q Do you recall about what time those telephone calls to the target began?

A I don't remember the exact time. I remember that it was dark outside. At that time, it could've been approximately seven p.m. in the evening. I don't remember the exact time though.

Q Okay. Do you recall how long it took from the time of the initial phone calls until your suspect arrived?

A I want to say between 30 and 45 minutes.

Q Do you recall exactly where the operation took place?

A You mean the exact address?

Q Yes. Or if you don't remember the exact address, roughly where it was?

A Yeah, it was in - - it was out off of Ward Road.

Q Okay.

A I don't know the exact address, but I - - like I could drive there right now if I needed to, but I don't remember the exact address.

Q Okay. Clark County, Washington?

A Yes, sir.

Q Okay. Do you recall where you were when the suspect arrived at the residence?

A Yes, I do. I was sitting on the informant's couch right just directly facing the front - - the entrance to the door. I'm set like - - I was maybe six or seven feet from the front door, looking directly at it.

Q Okay. Did you see the suspect arrive?

A Yes, I did.

Q Did a person who's currently sitting in this courtroom arrive at the house that day?

A Yes, he did.

Q Okay. Could you please identify that person to the Court?

A It's the defendant.

- (RP 118, L.4 – 120, L.4)

The record clearly demonstrates that the use of telephone was instrumental in facilitating the sale of drugs by the defendant.

Crime-related conditions must relate directly “to the circumstances of the crime,” and Appellate Court reviews them under an abuse of discretion standard. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (alternation in original) (quoting State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006)). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). In reviewing

community custody prohibitions, the Court looks to whether the defendant possessed the prohibited item on arrest, whether the defendant used it to facilitate the crime, and whether the trial court made any relevant findings. Zimmer, 146 Wn. App. at 413. “Forbidding a defendant from possessing drug paraphernalia, where the conviction was related to drugs or substance abuse, ‘is a “crime-related prohibition” authorized under RCW 9.94A.700(5)(e).’” State v. Valencia, 148 Wn. App. 302, 323, 198 P.3d 1065 (2009) (quoting State v. Motter, 139 Wn. App. 797, 804, 162 P.3d 1190 (2007), review denied, 163 Wn.2d 1025 (2008)).

As stated in State v. Warren, 165 Wn.2d 17, 20-22, 195 P.3d 940 (2008):

The Sentencing Reform Act of 1981 (Act), RCW 9.94A.505(8), authorizes the trial court to impose “crime-related prohibitions.”

Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. State v. Armendariz, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(13). This court reviews sentencing conditions for abuse of discretion. State v. Riley, 121 Wn.2d, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonable crime related. *Id.* at 36-37.

The defendant has also questioned the nature of the drug paraphernalia prohibition. It is the State's position that it is not ripe for appeal at this time and, further, that it is not unconstitutionally vague.

Our Supreme Court recently addressed pre-enforcement challenges to a community custody condition. In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), the court held that such challenges are ripe for review when they deal with primarily legal issues that courts can resolve on the record before it without the need for additional facts. Bahl, 164 Wn.2d at 751. Such is not the case here, however.

Bahl suggests the following test for appellate courts to use in determining whether a community custody condition challenge is sufficiently ripe for review: when (1) the issues raised are primarily legal, (2) determination of these issues requires no further factual inquiry, and (3) the challenged action is final. 164 Wn.2d at 751. Additionally, the reviewing court must consider "the hardship to the parties of withholding court consideration." 164 Wn.2d at 751 (quoting First United Methodist Church v. Hearing Exam'r, 129 Wn.2d 238, 255, 916 P.2d 374 (1996)).

Applying this test here, the State submits the Defendants' challenge is not ripe for review. In Bahl, the community custody condition prohibiting the possession of pornographic materials, implicated a First Amendment right. But here, Defendants base their vagueness

challenge on a due process argument, which does not implicate the First Amendment. When a vagueness challenge does not involve a First Amendment right, the Court evaluates it in light of the facts of each particular case. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). Therefore, an inquiry into whether the community custody paraphernalia condition is unconstitutionally vague, as applied to Defendant, is premature unless and until he can show that the condition actually caused him harm. Because he has not yet been released from confinement and placed on community custody, the defendant cannot show that this condition causes him harm.

Because the community custody prohibition of possessing drug paraphernalia requires proof of Defendants' intent to use ordinary household objects to ingest or to facilitate the sale or transfer of illegal drugs, withholding review at this stage does not cause Defendant significant hardship. Accordingly, the Defendants' challenge to the paraphernalia community custody condition is not ripe for review under Bahl. Therefore, it should not be considered. Any analysis of this intent is going to require additional factual determinations which, obviously, cannot be made while the defendant is still incarcerated. Community custody conditions will not begin to operate until the people are out of custody, operating in the real world, and, at that point, this issue may

become germane if the community corrections officers decide to impose the conditions. It would only be at that stage where the defendant can demonstrate any type of significant hardship. If the defendant can show actual harm once he is released on community custody, he would have standing to file a personal restraint petition raising the issue at that time. RAP 16.4; In re Personal Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995).

As indicated by Division II: State v. Isidro Sanchez Valencia, 148 Wn. App. 302, 320-322, 198 P.3d 1065 (2009):

Second, Sanchez and Sanchez Valencia's community custody conditions prohibit them from processing drug paraphernalia. And, unlike pornography, a court's determination of whether Sanchez or Sanchez Valencia have been provided sufficient warning of what items they are prohibited from possessing necessarily rests on a factual record demonstrating the manner in which they used or possessed the item alleged to violate the prohibition. For example, a soda pop can used for its intended purpose is not drug paraphernalia. But when the same soda pop can is modified for use as a pipe to ingest illegal drugs, it becomes drug paraphernalia. Thus, whether Sanchez and Sanchez Valencia's community custody condition prohibits them from possessing an item such as a can of soda pop depends on how they modify it for a different use or intend to use the item. And a reviewing court cannot make that determination without context. Because a more developed factual record is necessary to resolve Sanchez and Sanchez Valencia's vagueness challenge, they fail to satisfy the second prong of the Bahl issue maturity test.

Finally, because an innocent object does not transform itself into drug paraphernalia absent a person's intention to

use it to ingest illegal drugs, withholding review of the constitutionality of the conditions at issue does not cause Sanchez and Sanchez Valencia significant hardship. In contrast, requiring that the trial court anticipate all future unlawful modifications or potential illegal uses of otherwise innocuous items before lawfully conditioning a convicted drug offender's release on avoiding such unlawful conduct poses a significant and likely insurmountable hardship. We agree, as the dissent suggests, that citation to statutes and infractions defining "drug paraphernalia" like RCW 69.50.102 and RCW 69.50.4121(1)(a)-(m) can assist in defining the phrase. We note, however, that, because these statutory lists are not exclusive, Sanchez and Sanchez Valencia's vagueness challenge remains. Their arguments demand an exhaustive and exclusive list of prohibited items the law does not require. Because it is not possible for the sentencing court to anticipate unlawful modifications and uses of otherwise lawful innocuous items, the validity of an alleged violation is necessary fact-based. Sanchez and Sanchez Valencia's challenge is premature and not ripe for review.

Bahl does not disturb the second limitation to vagueness challenges of community custody conditions: that "[i]mpossible standards of specificity' are not required since language always involves some degree of vagueness." 164 Wn.2d at 759 (internal quotation marks omitted) (quoting State v. Halstein, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). And a community custody condition "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). While a greater degree of specificity is required when a community custody condition implicates First Amendment rights, such as a prohibition on possessing pornography, there is no corresponding First Amendment right to possess drug paraphernalia. Bahl, 164 Wn.2d at 757-58; see City of Tacoma v. Luvene, 118 Wn.2d 826, 842-44, 827 P.2d 1374 (1992) (city ordinance prohibiting soliciting, enticing, inducing, or procuring another to exchange, buy, sell, or

use drug paraphernalia did not reach into arena of constitutionally protected First Amendment conduct).

In Motter, we reasoned that “[i]t is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances.” 139 Wn. App. at 804. Following Motter, we hold that the trial court is not required to list every drug paraphernalia item Sanchez and Sanchez Valencia are prohibited from possessing. The condition is sufficiently specific to notify Sanchez and Sanchez Valencia that they shall not use or possess drug paraphernalia. The fact that many legitimate items may be used to ingest or sell drugs does not make this condition unconstitutionally vague, because an item is not drug paraphernalia if possessed for its intended, lawful use. This is particularly true when the condition lists several common items that Sanchez and Sanchez Valencia are prohibited from possessing.

III. CONCLUSION

The State submits that this matter is not ripe for review. It does not implicate first amendment constitutional rights and as such there is a strong likelihood that it would require additional facts to determine whether or not there has been a violation of a condition.

DATED this 18 day of August, 2009.

Respectfully submitted:

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DECLARATION OF TRANSMISSION
BY MAILING

STATE OF WASHINGTON)
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COUNTY OF CLARK)

On August 20, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

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DOCUMENTS: Brief of Respondent

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

Abby Rowland
Date: August 20, 2009.
Place: Vancouver, Washington.