

No. 40848-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

HOPEANN EVAN,

Appellant.

BY  STATE OF WASHINGTON
DEPUTY

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COURT OF APPEALS
DIVISION II

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

The Honorable Bryan Chushcoff (trial and sentencing), and the Honorable
Vicki L. Hogan (motion), Judges.

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove appellant Hopeann Evan guilty of the offense of failure to register as a sex offender.

2. Evan assigns error to conclusion of law 3, to the extent it found that “based on the totality of the circumstances, and beyond a reasonable doubt,” the defendant “did knowingly fail to comply with his [sic] sex offender registration requirements.” CP 52. She also assigns error to the portion of conclusion 4 that “there was sufficient evidence to show that. . .the defendant knew she was required to register as a sex offender on or about November 18, 2008.” CP 52.

3. The sentencing court erred and violated Evan’s due process rights by imposing conditions of community custody which were unconstitutionally vague and improperly delegated the court’s authority and duties to the Department of Corrections (DOC).

4. Evan assigns error to the following conditions of community custody from the judgment and sentence:

4.4 OTHER:

...

Follow all directions, conditions + instructions of CCO

...

4.6 ...

The defendant shall participate in the following crime-related treatment or counseling services: any per CCO.

...

The defendant shall comply with the following crime-related prohibitions: per CCO.

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: per CCO.

...

5.10 OTHER: per CCO + Appendix F.

CP 62-75. She also assigns error to the following conditions from Appendix F to the judgment and sentence:

x(VI) The offender shall comply with any crime-related prohibitions.

x(VII) Other: per CCO.

CP 76-77.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove Ms. Evan guilty of failing to register as a sex offender, the prosecution had to show, *inter alia*, that she knowingly failed to comply with registration requirements. Evan's sex offense occurred when she was 14 years old, years before there were provisions in the registration statute requiring the homeless to register. Evan failed to register anywhere after she was evicted from her apartment and she said she did not register because she was homeless. Is reversal and dismissal required because the prosecution failed to prove that Evan was ever given any notice of the new requirements for homeless registration and that thus she knowingly fail to register?

2. The sentencing court has the duty to set the conditions of community custody. Further, under the state and federal due process clauses, a condition must be sufficiently specific to give the defendant notice of what is prohibited or required and to prevent arbitrary enforcement.

In this case, the sentencing court imposed conditions of community custody which delegated to the DOC community corrections officer to decide what “crime-related” treatment, counseling and prohibitions will apply. The court also imposed a condition delegating to the CCO the authority to impose any conditions he or she chose.

Did the court err and violate due process in imposing the conditions? Further, did the court err and improperly delegate its authority to DOC, in violation of its mandatory sentencing duties?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Hopeann Evan was charged by amended information with failing to register as a sex offender and two counts of bail jumping. CP 33-34; RCW 9A.44.130, RCW 9A.76.170.

After a continuance before the Honorable Vicki L. Hogan on April 5, 2010, a bench trial was held before the Honorable Judge Bryan E. Chushcoff on May 10, 11, 12 and 13, 2010, after which the judge found Ms. Evan guilty as charged. RP 246-50; CP 36, 46-55.

On June 11, 2010, Judge Chushcoff imposed a standard-range sentence. CP 59-77.

Evan appealed and this pleading follows. See CP 78-97.

2. Relevant facts

Hopeann Evan was a juvenile when, in 1991, she was convicted of rape of a child in the first degree, an offense which required her to register as a sex offender. RP 13.

Evan’s first registration was on November 9, 1992, when she was

released from Echo Glen juvenile detention center at about age 15 after serving time there on the underlying offense. RP 29, 50. That registration was for an address on North Union in Tacoma. RP 29. On July 20, 1995, Evan filed a change of address indicating she was moving to an address on Sixth Avenue in Tacoma. RP 31. On November 25, 1997, she registered as moving from that address to another address on Sixth Avenue. RP 32-33. On January 15, 1998, she filed a change of address to another address on Sixth, and on October 6, 1999, she filed a change of address registration moving from the Sixth Avenue address to one on South 13th. RP 36-37. On March 14, 2001, she registered at a new address on South Junet Street. RP 37-38. On April 1, 2004, she moved to an address in Lakewood, registering accordingly. RP 39-40. On October 18, 2004, she registered for another address. RP 40-41. On April 28, 2006, she registered for an address on South 8th Street. RP 42-43. She did not reregister to a new address on South Warner Street until June 15, 2009, after she was arrested for the current offense. RP 44-45.

Paul Post, the landlord for the South 8th Street address, said he evicted Evan due to nonpayment of rent in about September of 2007. RP 58-60. He was sure that Evan was not living there on November 8 of 2008. RP 67. On that day, Tacoma City Police detective Scott Yenne went to the South 8th Street address, conducting a sex offender registration/address verification check on Evan. RP 126-30. Once there, he spoke to an adult and a teenager, neither of whom was identified as Evan. RP 130-31. Yenne determined that Evan was “not at the residence” and the officers moved on. RP 132. Yenne later checked to

see if Evan was in jail and found out that she was not. RP 132. Yenne also learned on a “records check” that there was a “recent pawn” for someone named Hopeann Evan with a phone number on it. RP 132. Yenne’s partner called the phone number and got no response. RP 132. One of them also called the phone number associated with the registered address and got no response. RP 133.

Based upon what he was told by the people at the address and not reaching Evan on the phone, Yenne and his partner decided that Evan was “in violation of her sex offender registry for that address.” RP 133. They wrote a report to that effect. RP 133.

Lisa Stephenson, an inspector with the federal sex offender investigations branch, was working with local officers in 2009 and went to the South Warner Street address with three other officers. RP 119. When they knocked on the door it was answered by some children, after which an older lady came up or yelled for them to come in. RP 119-20. Stephenson told the lady that Evan had a warrant out for her arrest and one of the children said Evan was upstairs, so Stephenson walked to the base of the stairwell and saw Evan there with an infant. RP 120.

Stephenson identified herself and told Evan they had a warrant for her arrest. RP 120. Stephenson admitted that Evan seemed surprised and did not seem to understand, asking why there was an arrest warrant for her. RP 124-25. The officer told her it was for failing to register. RP 125.

Evan’s boyfriend, Anthony Nuno, was the son of the older lady the officers had contacted at the South Warner address. RP 144-49. He

testified that Evan was living in a motel paying a bunch of money to have a place for her kids and Nuno's mother had Evan move in and pay rent to her, instead. RP 146, 150. After about a year, Nuno's mom's house was foreclosed on and she had to move into subsidized housing but could not have Evan there because of Evan's criminal history. RP 150. Nuno stuck up for Evan and got kicked out along with her, so they moved together to Evan's sister's place, where they had been for about six months at the time of trial. RP 150.

Evan testified that she was convicted of the sex offense when she was around 14 years old and was released from Echo Glen juvenile facility to a girls' group home in Tacoma when she was about 15, until she turned 18. RP 160-72. Evan explained that, when she was released from Echo Glen, she was not given any documents about registration requirements. RP 173. She assumed the staff at the group home or her caseworker might have gotten something about registration but she herself had been given nothing. RP 173.

Evan did not recall initially registering in 1992 and having her photo taken although she agreed it appeared that was what happened. RP 184. She also did not recognize the signature on the documentation from 1992 as hers. RP 184.

When she was released from the group home, Evan was told that she needed to register at the new place she went to. RP 174, 186. She was not told that she needed to keep registering after that. RP 185-88. She nevertheless continued to register whenever she had an address. RP 187.

In total, from November 9 of 1992 to April 26 of 2006, Evan had gone into the sheriff's department and registered her moves 9 times. RP 189. She knew that if she failed to do so, she could be convicted. RP 189. In 1988, she was, in fact, convicted of failing to register. RP 187. At that time, she was also told that she could look into having the conviction taken off her record and not have to register any more. RP 187.

Evan freely admitted that she had been evicted from the South Eighth Street address and was not living there on November 8, 2008. RP 189. The reason she had stopped registering for a couple of years was that she did not have a permanent address and was living from "place to place." RP 175. She said that she had continued to register after her conviction in 1998 but stopped again recently because she had been homeless. RP 175. Once she was evicted in 2007 she had moved around, living with her sister or in a motel when she had the money, along with her three children. RP 174-76. When she moved in with her boyfriend's mother, that was supposed to be temporary, for a few months. RP 193.

Evan explained that she was "technically still homeless" when they were living at the South Warner address, although she had shelter. RP 194. Evan thought that, when she was at a motel for more than a month before moving in with her boyfriend's mom, she had sent notification of a change of address but the division obviously had not gotten it. RP 191. Evan explained that she did not have any way to go down to the department to register when she was living at the motel because all her money was going to pay for the room and she had nothing

else. RP 192.

Evan was not given a “full registration” packet which included all the relevant laws and information until 2009, after the events regarding this case. RP 184-87. Even after the 1998 conviction, no one gave Evan a piece of paper with all the rules or explained that she had to register when she was homeless. RP 184-87. Evan explained that she had not known there were special requirements for people who are homeless to register. RP 177. Evan made it clear that she had not continued to register because she was not aware that when you are homeless, you were required “to let them know where you are staying.” RP 190. She said that she now knew that you had to do that even if you were living in a car. RP 190.

Evan was surprised when the officers came to arrest her because she did not know she had a warrant for her arrest. RP 176. In addition to not knowing that she had to register as a homeless person, she also thought that she would not have to continue to register after ten years from her last conviction, which was in 1998. RP 208.

An assistant in the Pierce County Sheriff’s Department registration unit, Andrea Shaw, testified that when someone who is convicted of a sex offense is going to live in the county, they now have to fill out a “full registration” packet which includes information about the relevant registration laws. RP 19-20. Shaw admitted, however, that at the time that Evan first registered in 1992, she was not given copies of the laws as now. RP 28, 50. Shaw also admitted that registration requirements have changed over the years and at one point people were limited to only having to register for 10 or 15 years, although she thought that the offense

for which Evan was convicted had always been a “lifetime” registration offense. RP 52-54.

The prosecution presented no evidence to prove what Evan was told about registration when she was found guilty as a juvenile in 1991, or what she was told after the failure to register in 1998. RP 52-54. Shaw admitted that nothing in Evan’s file indicated that Evan had been notified of a lifetime registration requirement. RP 54-55.

Evan also explained about not showing up for court on several days, saying she had gotten the dates and times wrong and, when she had found out her mistakes, had immediately contacted her attorney to try to fix it. RP 178-201. Nuno and Evan’s sister confirmed that she had gotten the times/days wrong and had been very surprised when she checked her paperwork and found she had missed court and when she went at the wrong time. RP 146-48, 156, 213-15.

In closing argument, the prosecutor admitted that the “crux” of contention in the case was whether Evan had “knowingly” failed to register. RP 220. He argued that the state should not have to prove that Evan was actually ever advised of the requirements of registration under the statute, complaining that the statute was very lengthy and had lots of requirements. RP 221-23. Counsel pointed out that Evan had been convicted first at age 14 and there was no proof that she was told the precise registration requirements. RP 232. He pointed out that the 1998 plea form said she needed to register where she is “residing” but she was homeless after that and did not have notice of the requirements for registration when she is homeless. RP 235. He also noted that the reason

the state now gave everyone the full packet was to show they know the law. RP 235. He concluded that there was no proof beyond a reasonable doubt that she knew of her obligation to register absent a “permanent residence.” RP 236.

In finding Evan guilty, the court told the prosecutor that the three charges were “completely unnecessary.” RP 241. The judge said it did not seem that Evan was “of bad moral character” but that the registration statutes were “almost a strict liability” kind of thing and “either you register or you don’t.” RP 241. The court was not sure about the registration requirement for homeless people and thought that it had only started in 1999, noting there was some “confusion” about the requirements for awhile until about 1999 or 2000. RP 246. The confusion was about whether “if you are homeless, do you register,” something which the court admitted the law was “kind of fuzzy” about as well. RP 247. The court thought, however, that even living in a motel room for four months, before the date alleged for the failure to register, Evan should have registered because she was “not homeless” at that time. RP 247-49.

The court noted that Evan was “very good” about registration over the years and it was therefore a shame she had failed to register for awhile because this was “almost a kind of strict liability kind of deal.” RP 249. The court concluded that it was “frustrating” because there were “a lot more important and dangerous criminals around here other than Ms. Evan.” RP 250. The court later entered written findings and conclusions in support of its decision. See CP 46-55.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR FAILING TO REGISTER

The state and federal due process clauses mandate that the prosecution bear the burden of proving all essential elements of a crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Sixth Amend.; Fourteenth Amend.; Art. I, § 22. If the prosecutor fails to meet that burden, reversal and dismissal with prejudice is required. See State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, this Court should reverse and dismiss the conviction for failure to register as a sex offender, because the prosecution failed to prove all of the essential elements of that crime, beyond a reasonable doubt. Evidence is sufficient to satisfy that burden if, taken in the light most favorable to the state, any rational trier of fact could have found the defendant guilty. Green, 94 Wn.2d at 221. Further, where the trial court enters written findings and conclusions after a bench trial, those findings must be supported by sufficient evidence, which is defined as enough to convince a fair-minded, rational person of the truth of the declared premise. See State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Here, there was insufficient evidence both to support the conviction and to support the trial court's findings on the essential *mens*

rea element of the crime. The essential elements of failing to register are 1) a prior conviction which requires registration, 2) a failure to follow the registration requirements of the statute and 3) that the failure to comply with the requirements is “knowing.” See State v. Flowers, 154 Wn. App. 462, 478, 225 P.3d 476 (2010); RCW 9.94A.44.130. Thus, contrary to the trial court’s declaration, the crime is not, in fact, a “strict liability” offense but requires proof of acting “knowingly.” A person acts “knowingly” when they are either “aware of a fact, facts or circumstances or result described by a statute defining an offense” or have “information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b).

Cases have found sufficient evidence that a defendant knowingly failed to register where there is evidence he was advised of the requirements and had complied the requirements in the past, or evidence that, in some way, he was made aware of the relevant requirements with which he had to comply. See, e.g., State v. Castillo, 144 Wn. App. 584, 183 P.3d 355 (2008); State v. Vanderpool, 99 Wn. App. 709, 995 P.2d 104, review denied, 141 Wn.2d 1007 (2000).

Thus, in Vanderpool, there was sufficient evidence to prove “knowing” failure where the defendant had complied with the registration requirements for four years, had been notified that he needed to continue to register each time he changed his address, had been taken to register by a treatment facility he was in and then had not registered at a new address after leaving the treatment facility. 99 Wn. App. at 713-14. The

defendant in Vanderpool said he was unable to understand the registration statute and thus could not be deemed to have “knowingly” failed to comply with it. 99 Wn. App. at 713-14. But the evidence showed not only his prior compliance but also that authorities had specifically read the statute to him. 99 Wn. App. at 713-14. Indeed, the defendant had actually signed a form which specifically set forth the requirements. Id. While he said he did not recall the form being read to him, there was evidence to the contrary. Id. As a result, and consistent with the principle that ignorance of the law is no excuse, the Vanderpool Court said, a fair-minded, rational trier of fact could have found the defendant had acted “knowingly” in failing to register.

Similarly, in Castillo, supra, the evidence was sufficient to prove that the defendant “knowingly” failed to register where he had previously registered several times at various addresses, had registered every week as a transient earlier in the year and had registered at his sister’s home two weeks before officers were told by the sister that he had been asked to leave and was no longer living there. 144 Wn. App. at 587-88.

In stark contrast, here, there was not sufficient evidence to prove that Evan knew that she was required to register when she did not have a “residence” address to register, i.e., considered herself transient. The registration requirements for transients were not written into the statute until 1999, fully 8 years after Evan, then a 14 year old child, was convicted of the crime for which she had to register. See Laws of 1999, 1st Sp. Sess., ch. 6, § 1-2; State v. Stratton, 130 Wn. App. 760, 766, 124 P.3d 660 (2005). Indeed, the “transient” requirements were added in 1999

because the plain language of the existing statute had been repeatedly held not to require registration for homeless offenders, because they did not have a “residence.” See State v. Pickett, 95 Wn. App. 475, 975 P.2d 584 (1999); see also State v. Bassett, 97 Wn. App. 737, 987 P.2d 119 (1999).

Thus, at the time Evan was first convicted of the sex crime at age 14 and at the time she first registered at age 15, there was no clear requirement that a person who was homeless had to register. Even in 1998, when she was convicted of failing to register, the “transient” or “homeless” requirements had not yet been added. As a result, there was no way she could have been made aware of those requirements at those times.

Further, the state presented no evidence that, since the time of the enactment of the requirements for homeless registration, Evan had ever been notified that the registration requirements had changed and she was now required to register whether she had a fixed address or was transient.

Even taken in the light most favorable to the state, there was insufficient evidence to prove that Evan knowingly failed to register as a sex offender on or about November 8, 2008, as charged. Reversal and dismissal is required.

2. THE SENTENCING COURT ERRED AND VIOLATED DUE PROCESS BY IMPOSING SEVERAL VAGUE CONDITIONS OF COMMUNITY CUSTODY WHICH IMPROPERLY DELEGATED THE COURT'S AUTHORITY TO THE COMMUNITY CUSTODY OFFICER

Several of the conditions of community custody must also be stricken as they violated due process and the trial court abdicated its

responsibility and improperly delegated its authority to DOC in imposing them. As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made “preenforcement” if the challenge raises primarily a legal question and no further factual development is required. Id.

The conditions in this case meet those standards. The relevant conditions were as follows:

4.4 OTHER:

...

Follow all directions, conditions + instructions of CCO

...

4.6 ...

The defendant shall participate in the following crime-related treatment or counseling services: any per CCO.

...

The defendant shall comply with the following crime-related prohibitions: per CCO.

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: per CCO.

...

5.10 OTHER: per CCO + Appendix F.

CP 61-77. And in Appendix F:

x(VI) The offender shall comply with any crime-related prohibitions.

x(VII) Other: per CCO.

CP 76-77.

All of these conditions were improper. A sentencing court is limited to imposing only those conditions which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). A condition is vague and in violation of due process if it either is not defined with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

Here, the conditions delegated to the CCO the authority to impose - and then enforce - virtually any conditions he or she desires, without giving Evan any notice of what those conditions will entail. But those conditions fail to define the prohibited conduct sufficiently and fail to provide ascertainable standards to prohibit arbitrary or discriminatory enforcement. Bahl, supra, is instructive. In Bahl, the relevant condition mandated that Bahl refrain from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. In finding the condition unconstitutionally vague, the Court declared, “[t]he fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent,”

because, with that language, the condition “virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement.” 164 Wn.2d at 758.

Similarly, in Sansone, supra, the Court struck down as unconstitutionally vague a condition which allowed the CCO and/or a therapist to define what constituted pornography and was thus prohibited for the defendant. 127 Wn. App. at 634-35. In finding the condition unconstitutionally vague, the Court noted that the vagueness of the condition was made clear by the delegation of defining “pornography” to DOC - “a requirement that would be unnecessary if ‘pornography’ was inherently definite.” 127 Wn. App. at 639. Further, the delegation of the authority to define what is prohibited to the CCO was especially improper because it creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds” to be so - even if it is not, legally, pornography. Id., quoting, United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.), cert. denied, 537 U.S. 1004 (2002) (citations omitted). Finally, that delegation was found to be an improper abdication of judicial responsibility for setting the terms of community custody, especially because DOC has several very different definitions of “pornography” in the various statutes and rules it applies. Sansone, 127 Wn. App. at 641-42.

The conditions in this case fall squarely in the same category as those in Bahl and Sansone. Indeed, arguably, the conditions in Bahl and Sansone gave more notice and ascertainable standards than provided here, at least indicating the general prohibition and that it has to do with

“pornography.” Here, the conditions do not even give their general subject, instead just allowing the CCO to decide what is “crime-related” as both a prohibition and in relation to evaluation and treatment. As in Bahl and Sansone, these conditions fail to define what is prohibited and fail to provide ascertainable standards for enforcement, improperly delegating to the CCO to make that determination.

Notably, the determination of what is “crime-related” is something even learned courts have difficulty making. A prohibition is only “crime-related” if it forbids conduct that “directly relates to the circumstances of the crime.” State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). While it need not be “causally” connected to the crime, any prohibition must still address conduct directly related to the crime. Zimmer, 146 Wn. App. at 413.

Thus, in Zimmer, when the defendant was convicted of methamphetamine possession and had been found with drug paraphernalia, a condition prohibiting possession of such paraphernalia while on community custody was sufficiently “crime-related.” 146 Wn. App. at 413. In contrast, a condition prohibiting the defendant from possessing or using cellular phones, pagers and hand-held electronic scheduling and data storage devices was not “crime-related,” despite the sentencing court’s apparent belief that such devices “can be used to facilitate the sale or transfer of controlled substances[.]” 146 Wn. App. at 411-12. Because there was no evidence that the defendant was found with any such devices in her possession when she was arrested or had used any such device to facilitate her crime, this Court held, the prohibition was not

“crime-related” even though it might seem so related at first glance:

We acknowledge that defendants may employ cellular phones or data storage devices to further their illegal drug possession, particularly if they intend to distribute or to sell the drug. We also note that cellular phones and data storage devices have become common place [sp].

But there is no evidence in the record that Zimmer possessed or used a cellular phone or data storage device in connection with possessing methamphetamine, and no evidence that she intended to distribute or sell methamphetamine using such devices.

146 Wn. App. at 414. As a result, this Court held, the trial court had abused its discretion in ordering the prohibition and it had to be stricken.

Id.

Thus, even trial courts have, in the past, overreached on what conditions can be “crime-related.” The wholly improper delegation of that determination to someone who is not even in the judicial branch is even more problematic as a result.

Further, the conditions giving the CCO the authority to require “crime-related” treatment run afoul of statutory mandates regarding such conditions. Even the sentencing court does not have the authority to order a mental health evaluation and treatment as a condition of community custody unless certain findings have been made. Former RCW 9.94A.505(9) (2008)¹; State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). And while former RCW 9.94A.715(2)(b)(2008)² authorized

¹This provision was removed from the statute in 2008. See Laws of 2008, ch. 231, § 25.

²This statute was repealed, effective August 1, 2009. See Laws of 2008, ch. 231, §§ 57, 61; Laws of 2009, ch. 28, § 42.

ordering participation in rehabilitative programs or engaging in affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community,” such conditions only meet that standard if the evidence showed that the defect or problem for which the programs or conduct are being ordered somehow contributed to the offense of conviction. Jones, 118 Wn. App. at 208.

Finally, all of these conditions must be stricken because they were an improper delegation of the sentencing court’s authority to DOC and violated Evan’s due process rights to notice of the conditions she would have to serve.

None of these conditions adequately define the prohibited conduct sufficiently to ensure that Evan understands what they encompass. Nor do they provide “ascertainable standards” for preventing arbitrary and discriminatory enforcement. Instead, they effectively delegate to DOC the authority to decide what treatment and counseling and prohibitions will apply at some point in the future.

With these conditions, that the sentencing court abdicated its responsibility for deciding what affirmative acts, counseling/treatment and prohibitions were proper in this case. While a sentencing court may delegate certain administrative tasks to DOC, it is not permitted to delegate its authority to DOC in a way which “abdicates its judicial responsibility” for setting the terms of community custody. Sansone, 127 Wn. App. at 642. Instead, it is the court’s responsibility to set forth those conditions in the judgment and sentence, leaving to DOC to handle

monitoring and enforcement. Former RCW 9.94A.700(5)(2008)³ provides the court with the authority - and the responsibility - to decide which conditions were proper and order those conditions.

Indeed, it is important for the court to take that responsibility, not only because it is required to do so as part of sentencing and not only because of due process concerns but also because of the role and function of this Court and Evan's constitutional right to a meaningful appeal. Evan's right to appeal from the judgment and sentence is effective now, after imposition of the sentence. See, e.g., State v. Sweet, 90 Wn.2d 282, 287, 581 P.2d 579 (1978); Art. I, § 22. It is now that the conditions of community supervision are subjected to the scrutiny of this Court to determine whether they are legally proper. The sentencing court's improper delegation to the CCO, a DOC employee, to decide what "crime-related" treatment Evan would have to perform and which "crime-related" prohibitions Evan would be required to follow failed to give her proper notice of those conditions, failed to provide sufficient standards to prevent arbitrary enforcement, precluded her from fully exercising his constitutional right to appeal and was a wholly improper abdication of the court's responsibilities. This Court should so hold and should strike all of the challenged conditions.

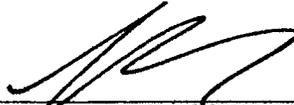
³This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

E. ~~CONCLUSION~~

Because there was insufficient evidence to prove an essential element of the crime, reversal is required. Further, the improper conditions of community custody must be stricken.

DATED this 11th day of December, 2010.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Ms. Hopeann Evan, DOC 777758, WCCW, 9601 Bujacich Rd.,
Gig Harbor, WA. 98332-8300.

DATED this 10th day of December, 2010.


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353