

COURT OF APPEALS
DIVISION II

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NO. 41674-3-II

STATE OF WASHINGTON
BY *[Signature]*

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DOUGLAS JACKSON,

Appellant.

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

The Honorable Edmund Murphy

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

pm 8/12/11

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that a jury convicted appellant of child molestation in the second degree involving domestic violence.

2. The trial court erred in entering a domestic violence no-contact order prohibiting appellant from having contact with the victim for ten years.

3. The trial court erred in sentencing appellant under former RCW 9.94A.712.

4. The trial court erred in ordering appellant to undergo a mental health evaluation and treatment as a condition of community custody.

5. The trial court erred in ordering appellant to undergo a chemical dependency evaluation and treatment as a condition of community custody.

6. The trial court erred in ordering appellant not to have access to the internet without child blocks in place as a condition of community custody.

7. The trial court erred in ordering appellant to complete Moral Reconciliation Therapy as a condition of community custody.

8. The trial court erred in ordering appellant not to possess or peruse pornographic materials as a condition of community custody.

Issues Pertaining to Assignments of Error

1. Did the trial court err by finding in the Judgment and Sentence that appellant was found guilty by jury-verdict of child molestation in the second degree - domestic violence when there was no finding by the jury that the crime involved domestic violence? (Assignment of Error 1).

2. Did the trial court err in entering a domestic violence no-contact order prohibiting appellant from having contact with the victim for ten years when the applicable statute authorizes the court to enter a sexual assault protection order for only two years? (Assignment of Error 2).

3. Did the trial court err in sentencing appellant under former RCW 9.94A.712 where the statute does not apply to the crime of child molestation in the second degree? (Assignment of Error 3).

4. Did the trial court err in ordering appellant to undergo mental health and chemical dependency evaluations and treatment; not to have access to the internet without child blocks in place; and to complete Moral Reconciliation Therapy (MRT) as conditions of community custody when the conditions are not crime-related? (Assignments of Error 4, 5, 6, 7).

5. Did the trial court err in ordering appellant not to possess or peruse pornographic materials as a condition of community custody where the condition is unconstitutionally vague? (Assignment of Error 8).

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On February 10, 2010, the State charged appellant, Kevin Douglas Jackson, with one count of child molestation in the second degree - domestic violence. CP 1; RCW 9A.44.086, RCW 10.99.020. Following a trial before the Honorable Edmund Murphy, on November 10, 2010, a jury found Jackson guilty of child molestation in the second degree. CP 81; 5RP 452-53. On December 17, 2010, the court sentenced Jackson to 17 months in confinement with 36 of months community custody and entered a domestic violence no-contact order. CP 86-107; 5RP 474-81.

Jackson filed a timely notice of appeal. CP 112.

2. Substantive Facts

a. Pretrial

The trial court granted the State's motion to exclude the expert testimony of a psychologist, reasoning that Jackson could present his defense of voluntary intoxication without expert testimony. The court

¹ There are five volumes of verbatim report of proceedings: 1RP - 11/01/10; 2RP - 11/02/10, 11/03/10; 3RP - 11/04/10; 4RP - 11/08/10; 5RP - 11/09/10, 11/10/10, 11/19/10, 12/17/10.

concluded that expert testimony on involuntary intoxication would not be helpful to the jury and is unnecessary because “the effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom.” 1RP 29-30.

The court held a 3.5 hearing and heard from a detective who interviewed Jackson after advising him of his rights and receiving his consent to videotape the interview. 1RP 38-41. The court ruled that the videotape was admissible subject to redaction. 1RP 59-61; CP 108-111.

b. Trial

K.J. (D.O.B. 2/16/1995) lived in Houston, Texas with her mother but spent her summers with her father, Kevin Jackson, who lived in Tacoma, Washington. 2RP 74-78. K.J. testified that in the summer of 2008, she went with Jackson to his friend’s house for a barbeque. 2RP 79-81. Jackson was drinking alcohol with the other adults. 2RP 83. When it started getting dark, K.J. went into a bedroom to lay down. Jackson was in the bedroom and “told me to lay down with him, so I laid down with him.” 2RP 83-84. While they were laying on the bed, Jackson took her hand and put it on “[h]is penis” moving her hand “around in circles” and said “[s]omething about work.” 2RP 84-87. Jackson was wearing sweats and her hand was over his clothes. 2RP 85, 98-99. After a couple of minutes, he put his hand down her pants “[o]n her butt.” 2RP 86.

K.J. told her mother about the isolated incident in 2009 when she was doing badly in school and her mother said she would send K.J. to live with Jackson. 2RP 96-97. K.J. told her mother at that time because she did not want to live with Jackson because she would be disciplined. 2RP 97.

Rebekah Jackson testified that she learned about the incident in October 2009 when she told K.J. that she was going to live with her father because she was acting up in school. 2RP 107-09. After K.J. revealed what happened, she reported the incident to Houston CPS. 2RP 131-32. She and K.J. went to an interview with CPS and the case was transferred to Pierce County, Washington. Two weeks later, a detective in Washington contacted her about the case. 2RP 135-36.

Detective Aguirre was assigned to K.J.'s case in November 2009. 4RP 279-80. During her investigation, she spoke with several witnesses including Kevin Jackson. 4RP 282. Jackson agreed to meet with Aguirre at the Tacoma Police Department on December 21, 2009. 4RP 283. Aguirre identified a videotape of the interview which was played for the jury. 4RP 283-86.

In the summer of 2008, Cindy Stuber was at her boyfriend's house for a barbeque. 4RP 248-50. Stuber testified that Jackson came to the barbeque with his son and daughter, K.J. 4RP 250-51. She saw him

eating and drinking with others. 4RP 251-52. Stuber had several rum and cokes. 4RP 253, 273-74. Sometime during the afternoon, on her way to the bathroom, she noticed Jackson and K.J. in a bedroom. They were laying on a bed and “Kevin was having [K.J.] touch his penis.” 4RP 255-57. Jackson had his jeans unzipped but he had his boxers on. 4RP 257-58. Stuber immediately told her boyfriend’s mother who went to the bedroom and “told [K.J.] to come out of the room.” 4RP 261.

Leah Wilson testified that she was at the barbeque and heard about what happened to K.J. 4RP 236-37. She took K.J. for a walk to a nearby store and talked to her while they were walking. At first, K.J. was “calm and collected,” but then began crying. When they returned to the house, “[e]verything went on as if nothing happened.” 4RP 240-41.

Jackson testified on his own behalf. While at the barbeque, he had beer, some mixed drinks, and shots. 4RP 330. Toward the end of the evening, “I felt myself getting light headed and my stomach starting to feel queasy. I felt like I was going to get sick.” 4RP 330. He went to the bathroom and threw up. Then his head started spinning so he laid down in a bedroom and fell asleep. 4RP 330, 333-34. Jackson recalled falling asleep and could not remember if K.J. came into the bedroom. 4RP 340-41.

Clarence Allen had known Jackson for over 25 years. 4RP 292-93. Allen testified that he was creating shots at the barbeque, “[a]dding alcohol to juice, energy drinks, taking straight shots, mixing different together.” 4RP 294. All the adults were drinking and enjoying themselves. 4RP 295-96. Jackson was drunk by the end of the night but managed to drive home with his children. 4RP 310-12.

Dolores Allen lived at her son’s home where they had barbeques during the summer. 4RP 314. Allen testified that Jackson and his daughter, K.J., came over for a barbeque in the summer of 2008. 4RP 314-15. Everyone was drinking, including Jackson, but she did not notice how much he had to drink. 4RP 315. At some point, she went to the bathroom and passed by her bedroom, “I could see my bed. I saw someone laying there.” 4RP 316. Allen looked in and saw K.J. with Jackson. K.J. said her father “got sick.” 4RP 316. She took K.J. out to play with the other children and Jackson was still laying on the bed when they left the room. 4RP 316-17. No one told her about any inappropriate touching that day. 4RP 319-20.

c. Sentencing

Jackson apologized for drinking to the extent that he blacked out, “I know I’m not a perfect father. I can become a better one because I always learn from my mistakes.” 5RP 471-73. The court stated, “I don’t

find that you are a bad person, Mr. Jackson. I think there is a lot of good to you. What you did that day, it is a terrible thing.” 5RP 474. The court imposed a middle of the range sentence of 17 months in confinement, ordered community custody with conditions recommended by the Department of Corrections, and entered an order prohibiting contact with K.J. for ten years. 5RP 475-81.

C. ARGUMENT

THE TRIAL COURT MADE NUMEROUS SENTENCING ERRORS WHICH REQUIRE A REMAND FOR RESENTENCING.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)(citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)) (“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”). A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); In re Postsentence of Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). “If the trial court exceeds its sentencing authority, its actions are void.” State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority is an issue of law reviewed de novo. State v. Murray,

118 Wn. App. 518, 521, 77 P.3d 1188 (2003); State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

1. The trial court erred in finding that a jury convicted Jackson of child molestation in the second degree involving domestic violence.

The Judgment and Sentence states the court finds that defendant was found guilty on 11-10-10 by jury-verdict of child molestation in the second degree under RCW 9A.44.086, RCW 10.99.020. CP 88. RCW 10.99.020(5) defines domestic violence as any offense that is committed by one family or household member against another. In re Personal Restraint of Washington, 125 Wn. App. 506, 510, 106 P.3d 763 (2004). The record reflects no finding by the jury that Jackson and K.J. were family or household members as defined under RCW 10.99.020(3). Consequently, remand is required to delete RCW 10.99.020 from the Judgment and Sentence.

2. The trial court erred in entering a domestic violence order prohibiting contact for ten years.

When a defendant is found guilty of a sex offense and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a "sexual assault protection order." RCW 7.90.150(6)(a). "A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect

for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.” RCW 7.90.150(6)(c). Child molestation in the second degree is a sex offense. RCW 9A.44.086, RCW 9.94A.030.

On December 17, 2010, the court erroneously entered an Order Prohibiting Contact (Domestic Violence) which ordered no contact between Jackson and K.J. for ten years. CP 106-07. Remand is required for the court to correct the unlawful order which violates RCW 7.90.150 and correct section 4.3 of the Judgment and Sentence which states that defendant shall not have contact with K.J. for ten years.

3. The trial court erred in sentencing Jackson under former RCW 9.94A.712.

Appendix H to the Judgment and Sentence states that the court having found defendant guilty of offense(s) qualifying for Community Custody, . . . Defendant additionally is sentenced on convictions herein, for the offenses under RCW 9.94A.712 CP 103. Former RCW 9.94A.712 provides in relevant part:

- (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
 - (a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion

Former RCW 9.94A.712 does not apply to Jackson who was convicted of child molestation in the second degree. Jackson should be sentenced under former RCW 9.94A.715 which applies when “a court sentences a person to the custody of the department of corrections for a sex offense not sentenced under RCW 9.94A.712” Remand is required for the court to correct Appendix H of the Judgment and Sentence.

4. The trial court erred in ordering conditions of community custody not authorized by statute.

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, an offender convicted of child molestation in the second degree shall be sentenced to community custody, in addition to other sentence terms. Former RCW 9.94A.715(1). As conditions of community custody, the court may order the offender to “participate in crime-related treatment or counseling services,” “comply with any crime-related prohibitions,” or “participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” Former RCW 9.94A.700(5)(c), (5)(e); Former RCW 9.94A.715(2)(a); RCW 9.94A.505(8).

a. Mental health evaluation and treatment.

A court may order an offender whose sentence includes community supervision to undergo a mental status evaluation and participate in mental health treatment, if the court finds that reasonable grounds exist to believe the offender is a mentally ill person and this condition likely influenced the offense. RCW 9.94A.505(9). A court may order mental health treatment and counseling “only if the court obtains a presentence report or mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense.” State v. Jones, 118 Wn. App. 199, 210, 76 P.3d 258 (2003).

The Department of Corrections presentence report states that Jackson “attested to having never been diagnosed with Depression or any other type of emotional or mental health disorder” and “he stated that no one else in his immediate family has had any treatment for or problems with emotional or mental health disorders to his knowledge.” Supp. CP _____ (DOC Presentence Report, 12/17/10). Inexplicably, the Community Corrections Officer recommended that Jackson obtain a mental health evaluation and follow any/all recommended treatment. At sentencing, the court ordered a mental health evaluation and treatment based on the recommendation without finding that Jackson was a mentally

ill person whose condition influenced the offense. 5RP 477. Furthermore, there was no evidence that mental illness contributed to Jackson's crime.

The court had no authority to order a mental health evaluation and treatment without evidence that Jackson suffered from a mental illness that had influenced the crime as required under RCW 9.94A.505(9), and RCW 9.94A.700(5) which requires that such treatment be "crime-related." Consequently, remand is required for the court to strike the condition and correct section 4.6 of the Judgment and Sentence which states that the defendant shall undergo an evaluation for treatment for mental health and fully comply with all recommended treatment. Jones, 118 Wn. App. at 210-12.

b. Chemical dependency evaluation and treatment.

RCW 9.94A.607(1) governs the authority of a court to order chemical dependency treatment:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

Former RCW 9.94A.700(5)(c) authorizes a court to order an offender to “participate in crime-related treatment or counseling services” as a condition of community custody.

The Department of Corrections presentence report notes that Jackson tried marijuana and “mushrooms” but nothing in the report indicates that Jackson has a chemical dependency problem. Nonetheless, the Community Corrections Officer recommended that Jackson obtain a chemical dependency evaluation and follow any/all recommended treatment. Supp. CP _____ (DOC Presentence Report, 12/17/10). At sentencing, the court told Jackson, “I think it is important that you get a chemical dependency evaluation.” 5RP 476. The court ordered Jackson to undergo an evaluation for treatment for substance abuse and fully comply with all recommended treatment. 5RP 477; CP 93.

Remand is required to strike the condition and correct section 4.6 of the Judgment and Sentence because the court had no authority to order a chemical dependency evaluation and treatment where the court did not find, and there was no evidence, that Jackson has a chemical dependency that contributed to the offense. See Jones, 118 Wn. App. at 207-08.

c. Access to the internet.

In State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), O’Cain argued on appeal that a condition of community custody

prohibiting him from unapproved internet access was not crime-related and therefore the trial court erred in imposing it. Id. at 774. Division One of this Court determined that there was no evidence, and the trial court made no finding, that internet use contributed to the crime. The Court held that because the prohibition was not crime-related, the condition must be stricken. Id. at 775.

Appendix H of the Judgment and Sentence orders Jackson not to have “access to the Internet without child blocks in place.” CP 105. As in O’Cain, the record reflects that there was no evidence, and the trial court did not find, that internet access contributed to the crime. Accordingly, remand is required for the court to strike the condition.

d. Moral Reconciliation Therapy

In State v. Vasquez, 95 Wn. App. 12, 972 P.2d 109 (1998), Vasquez challenged the trial court’s order that he “enter in and successfully complete the Moral Reconciliation Therapy (MRT) Program, as directed by his Community Corrections Officer,” contending that the MRT was not crime-related. Id. at 15. Division One of this Court noted that Vasquez’s argument before the trial court that MRT was not crime-related lacked clarity and that the CCO’s comments about his need for MRT suggested that it was not related to the specific circumstances of the crime. Id. at 16. The Court concluded that the condition must be stricken because

“[w]e do not have sufficient evidence before us to determine whether the MRT ordered for Vasquez was crime-related, and neither did the trial court.” Id. at 16-17.

In the Department of Corrections presentence report, the Community Corrections Officer stated in his recommendations that Jackson “will need to participate in DOC’s Moral Recognition Therapy (MRT) program without further explanation. Supp. CP ____ (DOC presentence report, 12/17/10). At sentencing, the prosecutor commented that the “Community Corrections Officer also noted the defendant will need to participate in the Department of Corrections moral recognition therapy program after his release. I’m not sure if that is a condition of sentence or if that is something that is done as a matter of course.” 5RP 467. Without a finding that the MRT was crime-related, the court ordered Jackson to “[s]uccessfully complete Moral Recognition Therapy (MRT) through DOC per CCO.” CP 105.

As in Vasquez, the condition must be stricken because there is insufficient evidence that the MRT ordered for Jackson was crime-related as statutorily required.

e. Pornographic Materials

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington State Constitution

requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008)(citing City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990)). A statute is unconstitutionally vague if it “(1) . . . does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) . . . does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Id. (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

Bahl challenged a condition of community custody which prohibited him from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Custody Corrections Officer.” Bahl, 164 at 754. The Supreme Court remanded for resentencing, concluding that the restriction on possessing or accessing pornographic materials was unconstitutionally vague. The Court concluded further that “[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, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id. at 758.

The court here ordered a condition of community custody all but identical to the condition in Bahl. In Appendix H of the Judgment and Sentence, the court ordered Jackson “not to possess or peruse

pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.” CP 104. As in Bahl, the condition must be stricken because it is unconstitutionally vague.

D. CONCLUSION

For the reasons stated, this Court should remand for the trial court to correct the sentencing errors.

DATED this 12th day of August, 2011.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Kevin Douglas Jackson

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Kevin Douglas Jackson, DOC # 345181, MCC-TRU, P.O. Box 888, Monroe, Washington 98272-0888.

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

DATED this 12th day of August 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

COURT OF APPEALS
DIVISION II
11 AUG 15 AM 9:30
STATE OF WASHINGTON
BY 
DEPUTY