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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 41735-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JONATHOM OSIER, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing an undefined sentencing condition that is unconstitutionally vague.
2. The sentencing court erred by delegating judicial discretion to a community corrections officer by ordering Mr. Osier to comply with a sentencing condition that will be defined by the CCO.
3. The sentencing court deprived Mr. Osier of his right to a meaningful appeal by failing to define a sentencing condition and leaving the definition and enforcement to the CCO.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the sentencing court violated the constitution by imposing a condition of community custody that leaves the definition of a condition up to the discretion of the corrections officer.

III. STATEMENT OF THE CASE

Jonathom Osier was convicted of failure to register in this case for being 18 days late in registering with the Pierce County Sheriff's office. 2RP 77. He was arrested while attempting to register. 2RP 99, 101. Mr.

Osier waived his right to a jury trial and was tried before the bench. CP 11.

Mr. Osier had last registered on August 18, 2010. 2RP 71. He had been registered as homeless since July 29, 2010. 2RP 61-62. He was arrested on September 21, 2010, while he was filling out the paperwork for registering, including a log of where he had been each intervening night. 2 RP 75, 98, 3RP 150.

Mr. Osier testified that he was not in Pierce County to register on August 25, 2010, but was travelling to and from Montana, on a visit to his uncle. 3RP 143, 144. Mr. Osier testified that he did not stay anywhere more than 36 hours and that he was homeless and walking or hitchhiking back from Montana during the period in question. 3RP 147-149. He registered in Pierce County as soon as he returned. 3RP 149. Mr. Osier believed that he had no obligation to register if he did not stay in one place longer than a day and intended to return. 3RP 150.

The court found Mr. Osier guilty of one count of failure to register and sentenced Mr. Osier to 43 months in prison. 3RP 186, CP 26. This appeal timely follows.

At the time of sentencing, Mr. Osier made motions to the court requesting new counsel and a new trial on the basis of ineffective assistance of counsel. CP 5-10, 39-40. Mr. Osier tells the court in his

motion that he had witnesses to corroborate his whereabouts during the time he was allegedly in violation of the registration statute, but that his attorney failed to subpoena any of them, with the result that the court did not find the defendant's uncorroborated testimony credible. CP 5-10, 39-40. The court denied Mr. Osier's motion for new counsel and did not rule on the motion for new trial. 1/28/11 RP 2-6.

IV. ARGUMENT

ISSUE 1: THE SENTENCING COURT VIOLATED THE CONSTITUTION BY IMPOSING A CONDITION OF COMMUNITY CUSTODY THAT LEAVES THE DEFINITION OF A CONDITION UP TO THE DISCRETION OF THE CORRECTIONS OFFICER.

The sentencing court in this case erred by imposing a condition on Mr. Osier's sentence that was to be defined by the Community Corrections Officer (CCO). Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. RCW 9.94A.507; RCW 9.94B.050. One condition that may be imposed is that an offender "shall comply with any crime-related prohibitions." RCW 9.94B.050. A sentencing court is limited to imposing only those conditions that are authorized by statute. *See State v. Zimmer*, 146 Wn. App. 405, 412, 190 P.3d 121 (2008), *review denied*, 165 Wn.2d 1035 (2009). In addition, the due process rights guaranteed under

the state and federal constitutions prohibit imposition of conditions that are unconstitutionally vague. *See State v. Sansone*, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005).

The judgment and sentence entered in this case states that, as a condition of community custody, Mr. Osier “shall comply with the following crime-related prohibitions: per cco.” CP 28. While the sentencing court is authorized by statute to impose crime-related prohibitions, the conditions imposed are subject to review by the appellate court and may be reversed if they are not actually “crime-related.” *See State v. Zimmer*, 146 Wn. App. 405, 412, 190 P.3d 121 (2008), *review denied*, 165 Wn.2d 1035 (2009). However, by abdicating its authority to impose specific conditions, leaving the actual conditions to the discretion of the CCO, the trial court has violated due process by imposing a condition that is unconstitutionally vague.

As a preliminary matter, this issue is ripe for review. 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). 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. *Bahl*, at 745-46.

The condition imposed on Mr. Osier meets the *Bahl* standards because the challenge here does not require further factual development to address the legal challenge. First, the condition is unconstitutionally vague. 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 is 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). Where a condition provides that a CCO “can direct what falls within the condition,” the Supreme Court has recognized that “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.” *Bahl*, 164 Wn.2d at 758. Further, such conditions fail to define the prohibited conduct with “sufficient definiteness such that ordinary people can understand what it encompasses.” *Sansone*, 127 Wn. App. at 639.

Furthermore, by delegating to the CCO—the person charged with enforcement of the condition—the decision of what, exactly, is prohibited or mandated creates a “real danger” of arbitrary enforcement based upon the CCO’s personal beliefs about what a defendant should and should not

be doing, even if those beliefs do not reflect the law. *See e.g., Sansone*, 127 Wn. App. at 639.

In this case, because there is no list of “crime-related prohibitions” that are imposed and no definition of how it is to be applied, there is insufficient notice to Mr. Osier, nor is there an ascertainable standard for enforcement—both of which are required by due process. By failing to define what prohibitions are imposed and the violation of which will result in incarceration, the court effectively ordered unfettered discretion for the CCO to decide what Mr. Osier should and should not be permitted to do, without notice to Mr. Osier or enforceable standards or limits.

In addition to being unconstitutionally vague, the way this condition was imposed amounts to a virtual abdication of judicial responsibility for setting the terms of community custody. Under RCW 9.94B.050(5)(e), it is the court that has the authority to order that the offender shall comply with “crime-related prohibitions.” While a sentencing court may delegate certain administrative tasks to DOC, it is not permitted to delegate its authority to DOC in a way that “abdicates its judicial responsibility” for setting the terms of community custody. *Sansone*, 127 Wn. App. at 642; *see also State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Instead, only the court is authorized by statute to set forth and define the conditions, leaving to DOC the

enforcement of the court's order. By failing to set forth specific "crime-related prohibitions" and leaving the definition of this term to the discretion of the CCO, the sentencing court has erroneously delegated judicial authority to the CCO.

It is essential that the court retain judicial authority in sentencing, not only because it is required by statute and the constitutional due process requirements, but also because otherwise, Mr. Osier is also deprived of his constitutional right to a meaningful appeal. Under article I, section 22, of Washington's Constitution, Mr. Osier has a right to appeal his conviction and sentence. *State v Sweet*, 90 Wn.2d 282, 287, 581 P.2d 579 (1978). Our appellate courts have repeatedly been called to review the legality of certain conditions imposed as "crime-related." *See e.g., Zimmer*, 146 Wn. App. at 413. By failing to set forth with specificity the "crime-related prohibitions" with which Mr. Osier will have to comply, the sentencing court effectively precluded meaningful review of them in violation of the constitution.

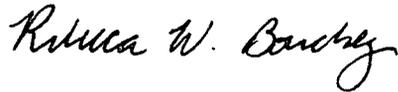
The sentencing court's erroneous failure to decide what "crime-related prohibitions" Mr. Osier would be required to follow as conditions of his community custody failed to give him proper notice of the conditions of his sentence, failed to provide sufficient standards to prevent arbitrary enforcement, precluded him from fully exercising his

constitutional right to appeal and is an improper abdication of the court's judicial discretion. This court should therefore remand with the order that this condition be either clearly define or struck from the judgment and sentence.

V. CONCLUSION

For the reasons stated above, Mr. Osier asks this court to remand for re-sentencing and the removal of the erroneous sentencing condition.

DATED: July 27, 2011



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CERTIFICATE OF SERVICE

I certify that on July 27, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail

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