

NO. 41735-9-II

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JONATHOM OSIER, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 10-1-04033-3

---

**Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
Thomas C. Roberts  
Deputy Prosecuting Attorney  
WSB # 17442

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. . . . . 1

    1. Did the sentencing court properly sentence defendant to crime-related prohibitions as directed by the community corrections officer, consistent with statutory authority granted by RCW 9.94A.704?..... 1

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

    1. Procedure ..... 1

    2. Facts..... 2

C. ARGUMENT..... 3

    1. The court, in sentencing defendant to community custody, did not give an unconstitutionally vague crime-related prohibition since the court did not grant the corrections officer any authority over that which statute already grants..... 3

D. CONCLUSION..... 9

## Table of Authorities

### State Cases

<i>Brooks v. Rhay</i> , 92 Wn.2d 876, 877, 602 P.2d 356 (1979).....	8
<i>In re Clark</i> , 24 Wn.2d 105, 113, 163 P.2d 577 (1945) .....	8
<i>Ledgering v. State</i> , 63 Wn.2d 94, 101, 385 P.2d 522 (1963).....	6
<i>Smith v. Hollenbeck</i> , 48 Wn.2d 461, 294 P.2d 291 (1956) .....	7
<i>State v. Bahl</i> , 164 Wn.2d 739, 744, 193 P.3d 678 (2008).....	3, 4, 7, 8
<i>State v. Ford</i> , 136 Wn.2d 472, 477, 973 P.2d 452 (1999).....	3
<i>State v. Sansone</i> , 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005).....	4, 5, 7, 8

### Statutes

RCW 9.94A.703.....	3, 7, 8
RCW 9.94A.703(3).....	6
RCW 9.94A.703(3)(f).....	3
RCW 9.94A.704.....	1, 5, 6, 7, 8
RCW 9.94A.704(4).....	5
RCW 9.94A.704(5).....	5
RCW 9.94A.704(5)(9) .....	8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the sentencing court properly sentence defendant to crime-related prohibitions as directed by the community corrections officer, consistent with statutory authority granted by RCW 9.94A.704?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2010, the State charged Jonathom Osier (hereinafter “defendant”) with one count of failure to register as a sex offender. CP 1.

Trial commenced on January 5, 2011. RP<sup>1</sup> 3. Defendant knowingly waived his right to a jury trial on the first day of trial. RP 4. The State rested its case on January 6, 2011. RP 137. Defendant testified in his own defense at trial. RP 137-165. After defendant’s testimony, the defense rested its case. RP 165.

On January 6, 2011, the court found defendant guilty of count I beyond a reasonable doubt. RP 186; CP 11-19.

---

<sup>1</sup> As the first three volumes of the verbatim report of proceedings are consecutively numbered, references to the VRP will be cited as “RP” and the appropriate page number.

The court held a sentencing hearing on January 28, 2011. 1/28/11 RP<sup>2</sup> 1-16. During the sentencing hearing, defendant filed a motion for a new attorney and a new trial based on a claim of ineffective assistance of counsel. 1/28/11 RP 3. The court denied the motion. 1/28/11 RP 5. The court sentenced defendant to the minimum standard range sentence of 43 months. CP 20-38; 1/28/11 RP 12-13.

## 2. Facts

A trial court found defendant guilty of child molestation in the first degree on September 15, 2004. RP 30. He had also been found guilty of failing to register as a sex offender on three different occasions. RP 32-35; CP 23.

Defendant performed his weekly sex-offender registration on August 18, 2010. RP 71. His next required check-in was August 25, 2010. RP 76. Defendant next checked in on September 21, 2010. RP 77. He was arrested by Detective Sergeant Benson for failing to register as sex offender. RP 77.

Defendant testified that he failed to register on August 25, 2010, because he had left Pierce County to visit a family member in Montana. RP 143-44. Per his testimony, defendant thought that he had no obligation to register if he did not intend to stay at the location. RP 162-64.

---

<sup>2</sup> Consistent with defendant's brief, the verbatim report of proceedings for the sentencing hearing will be cited to as "1/28/11 RP" and the appropriate page number.

C. ARGUMENT.

1. THE COURT, IN SENTENCING DEFENDANT TO COMMUNITY CUSTODY, DID NOT GIVE AN UNCONSTITUTIONALLY VAGUE CRIME-RELATED PROHIBITION SINCE THE COURT DID NOT GRANT THE CORRECTIONS OFFICER ANY AUTHORITY OVER THAT WHICH STATUTE ALREADY GRANTS.

A sentencing court has statutory requirements and limitations regarding what conditions may be imposed. “[I]llegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 136 Wn.2d 472, 477, 973 P.2d 452 (1999)). The Washington Supreme Court has held that issues of vagueness in sentencing potentially fall under such erroneous sentences and warrant review for the first time on appeal. *Bahl*, 164 Wn.2d at 745.

When imposing community custody on a defendant, RCW 9.94A.703 specifies not only what conditions the court must impose but also what conditions may be imposed at the discretion of the court. One of the discretionary conditions a court may impose is to require the defendant to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Conditions of community custody imposed within the discretion of the sentencing court will only be reversed if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753.

The Washington Supreme Court has previously determined that ambiguous language in the conditions of community custody that is unconstitutionally vague warrants remand for the sentencing court to provide more specific language. *Bahl*, 164 Wn.2d at 761-62. In *Bahl*, a prohibition against owning “pornographic materials” as part of a condition of community custody was unconstitutionally vague, requiring remand for resentencing. *Bahl*, 164 Wn.2d at 761-62. The Court of Appeals similarly held the word “pornography” to be unconstitutionally vague. *State v. Sansone*, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005). When a condition of community custody is found to be unconstitutionally vague, it violates the offender’s due process right as it does not grant him the ability to effectively know what constitutes a violation and what does not. *Sansone*, 127 Wn. App. at 639; *Bahl*, 164 Wn.2d at 757-58.

The sentencing court cannot alleviate vagueness by delegating the responsibility of clarification to the community corrections officer. *Sansone*, 127 Wn. App. at 642. In *Sansone*, the court required that “Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.” *Sansone*, 127 Wn. App. at 634-35. The Court of Appeals held this excessive delegation of judicial authority as unacceptable due to the fact that different community corrections officers could interpret the word differently with widely varying results. *Sansone*, 127 Wn. App. at 642. “The fact that one term could be defined so differently indicates the impropriety of delegation; neither Sansone nor

his CCO were put on notice as to what would result in Sansone being sent back to prison.” *Sansone*, 127 Wn. App. at 643. However, the court in *Sansone* did not foreclose on delegation entirely. “We note that our holding is limited to the circumstances at hand. A delegation would not necessarily be improper if Sansone were in treatment and the sentencing court had delegated to the therapist to decide what types of materials Sansone could have.” *Sansone*, 127 Wn. App. 643. Therefore, there is an appropriate level of judicial authority in sentencing which the court can delegate to the community corrections officer.

- a. The court, in sentencing defendant, merely asserted the Department of Corrections’ ability to impose conditions on defendant pursuant to RCW 9.94A.704.

Independent of the conditions prescribed by the court during sentencing, a community corrections officer has authority to impose specific conditions or requirements upon a person under community custody. RCW 9.94A.704. The community corrections officer can require that the offender participate in rehabilitative programs, engage in other affirmative conduct, and obey all laws. RCW 9.94A.704(4). For a sex offender, the community corrections officer can impose electronic monitoring. RCW 9.94A.704(5). Thus, a community corrections officer has specific enforcement powers over the offender that need not be specifically designated by the court at sentencing.

Here, the sentencing court put in the judgment and sentence that “[t]he defendant shall comply with the following crime-related prohibitions: per CCO.” CP 20-38. The community corrections officer has authority to impose conditions on defendant, including some conditions dependent on the fact that defendant committed a sex offense. The court did not specifically impose any other conditions. Thus, the court’s intention in writing “per CCO” should be read as to mean nothing more than indicating that the only authority granted the community corrections officer is that authority granted by statute per RCW 9.94A.704, and not anything beyond that.

During sentencing, the court made a point regarding sentencing defendant to the minimum sentence. 1/28/11 RP 13. The court also specifically directed that defendant would have to pay certain fees and register as a sex offender. 1/28/11 RP 13-14. The court said nothing during sentencing to suggest that there would be additional crime-related prohibitions imposed upon defendant pursuant to RCW 9.94A.703(3). When reading the sentence imposed upon the defendant, the sentence can be interpreted as unconstitutionally vague such that the court exceeded its authority or it can be interpreted as comporting with the language of RCW 9.94A.704. “[C]ourts must, in the absence of evidence to the contrary, presume public officers perform their duties properly, legally, and in compliance with controlling statutory provisions.” *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963) (citing *Smith v. Hollenbeck*, 48

Wn.2d 461, 294 P.2d 291 (1956)). The court should, in the present case, presume that the sentencing court acted within the rule of law rather than presuming that it acted outside of its legal authority.

- b. This case can be distinguished from *Bahl* and *Sansone* as the court did not impose a condition pursuant to RCW 9.94A.703 and then fail to specify how the condition would be enforced.

The case at bar is readily distinguishable from *Bahl* and *Sansone*. Both *Bahl* and *Sansone* involved the sentencing court prohibiting the offender from owning pornography and relying on the community corrections officer to enforce the prohibition. Such a prohibition falls outside of the authority granted to a community corrections officer under RCW 9.94A.704, and instead rests in the court's power under RCW 9.94A.703. An offender with a prohibition against owning pornography does not necessarily know what type of material constitutes pornography. As the Supreme Court states in *Bahl*, there exists many different definitions of "pornography", and if the offender does not know which one applies to his circumstance, he could unknowingly violate the conditions of his community custody without being made aware of what the conditions explicitly meant. *Bahl*, 164 Wn.2d at 687-688. Thus, a court imposing conditions pursuant to RCW 9.94A.703 must be specific in describing those conditions as to not violate due process.

Here, the court did not exercise its authority under RCW 9.94A.703 when it indicated that defendant must abide by crime-related prohibitions per the community corrections officer. The court gave no explicit crime-related prohibitions in sentencing whatsoever. CP 20-38; 1/28/11 RP 1-16. Instead, the limited language used by the court merely asserted the community corrections officer's duties under RCW 9.94A.704 as they relate to a sex-offender. *See* RCW 9.94A.704(5)(9).

Even if the court finds that the language used by the sentencing court was vague, any error would be harmless in this context. “[W]here a sentence is legal in one part and illegal in another, the illegal part, if separable, may be disregarded and the legal part enforced.” *Brooks v. Rhay*, 92 Wn.2d 876, 877, 602 P.2d 356 (1979) (citing *In re Clark*, 24 Wn.2d 105, 113, 163 P.2d 577 (1945)). Here, the erroneous portion of the sentence, “per CCO,” in which the court delegated undue authority to the community corrections officer would be disregarded. Since the community corrections officer has authority under RCW 9.94A.704 to impose specific conditions upon defendant, no part of the sentence would change with the offending element removed.

Given that the sentences in *Bahl* and *Sansone* related particularly to ambiguous requirements imposed under RCW 9.94A.703, and did not pertain to the standard powers afforded a community corrections officer under RCW 9.94A.704, the case at bar can be readily distinguished from those cases. Thus, unlike *Bahl* and *Sansone*, the court here did not abuse

its discretion or impose unconstitutionally vague requirements upon defendant.

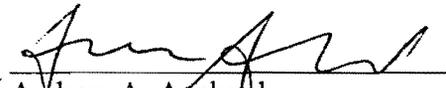
D. CONCLUSION.

The sentencing court did not impose an unconstitutionally vague nor inappropriate sentence on defendant. The court comported with the statutory guidance regarding actions enforceable by community corrections officers. For reasons argued above, the State asks that the Court affirm the judgment of the trial court below.

DATED: September 21, 2011.

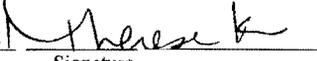
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
THOMAS C. ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442

  
Andrew A. Asplund  
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.21.11   
Date Signature

**PIERCE COUNTY PROSECUTOR**

**September 21, 2011 - 1:37 PM**

**Transmittal Letter**

Document Uploaded: 417359-Respondent's Brief.pdf

Case Name: St. v. Osier

Court of Appeals Case Number: 41735-9

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)

A copy of this document has been emailed to the following addresses:

[rwoldbouchey@comcast.net](mailto:rwoldbouchey@comcast.net)