

NO. 45230-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL STEPHENS,

Appellant.

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

The Honorable George L. Wood, Judge

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	3
1. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY PROHIBITING STEPHENS FROM POSSESSING ALCOHOL AND FORBIDDING HIM FROM ENTERING ANY PLACE WHERE ALCOHOL IS THE CHIEF ITEM FOR SALE. ....	3
2. THE CONDITION FORBIDDING STEPHENS FROM ENTERING ANY PLACE WHERE ALCOHOL IS THE CHIEF ITEM OF SALE VIOLATES HIS CONSTITUTIONAL RIGHT TO FREEDOM OF ASSOCIATION.....	6
3. THE CONDITION REQUIRING STEPHENS TO SUBMIT TO UNDEFINED PHYSICAL OR PSYCHOLOGICAL TESTING IS UNCONSTITUTIONALLY VAGUE. ....	7
4. THE ORDER PROHIBITING CONTACT WITH STEPHENS’S CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.....	10
D. <u>CONCLUSION</u> .....	15

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Marriage of Parker</u> 91 Wn. App. 219, 957 P.2d 256 (1998).....	9
<u>In re Parentage of C.A.M.A.</u> 154 Wn.2d 52, 109 P.3d 405 (2005).....	12
<u>In re Personal Restraint of Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	6, 10, 12, 13, 14
<u>State v. Acevedo</u> 159 Wn. App. 221, 248 P.3d 526 (2010).....	8
<u>State v. Ancira</u> 107 Wn. App. 650, 27 P. 3d 1246 (2001).....	12
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	6, 8
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	3
<u>State v. Combs</u> 102 Wn. App. 949,10 P.3d 1101 (2000).....	8
<u>State v. Corbett</u> 158 Wn. App. 576, 242 P.3d 52 (2010).....	12
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	5
<u>State v. Julian</u> 102 Wn. App. 296, 9 P.3d 851 (2000) <u>review denied</u> , 143 Wn.2d 1003 (2010). .....	5
<u>State v. Land</u> 172 Wn. App. 593, 295 P.3d 782 <u>review denied</u> , 177 Wn.2d 1016 (2013) .....	9

**TABLE OF AUTHORITIES**

	Page
<u>State v. Letourneau</u> 100 Wn. App. 424, 997 P.2d 436 (2000).....	11
<u>State v. Parramore</u> 53 Wn. App. 527, 768 P.2d 530 (1989).....	4, 8, 11
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998),.....	6, 7, 11
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	6, 8, 12
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.2d 940 (2008).....	6, 11, 12, 14
<u>Tacoma v. Luvene</u> 118 Wn.2d 826, 827 P.2d 1374 (1992).....	6

**FEDERAL CASES**

<u>Papachristo v. Jacksonville</u> 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).....	6
<u>Santosky v. Kramer</u> 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) .....	12

**RULES, STATUTES AND OTHER AUTHORITIES**

RCW 9.94A.030 .....	4, 6, 11
RCW 9.94A.505 .....	11
RCW 9.94A.703 .....	3, 8, 11
Sentencing Reform Act.....	4, 5, 6, 11
U.S. Const. amend. I.....	6

**TABLE OF AUTHORITIES**

	Page
U.S. Const. amend. XIV .....	6, 9, 12
Wash. Const. art. I, § 3 .....	6, 9
Wash. Const. art. I, § 4 .....	6

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it entered a community custody condition prohibiting the appellant from possessing alcohol.
2. The sentencing court erred when it entered a condition forbidding the appellant from entering places where alcohol is the “chief item of sale.”
3. The sentencing court erred when it entered a condition requiring the appellant "to submit to physical and/or psychological testing whenever requested by the Community Custody Officer” (CCO).
4. The sentencing court erred when it entered an order and community custody condition prohibiting contact with minors, including the appellant’s non-victim biological children.

Issues Pertaining to Assignments of Error

1. Where there was no evidence that the appellant’s crimes involved the use of alcohol, must the condition prohibiting him from possessing alcohol be stricken?
2. For similar reasons, must the condition prohibiting him from entering places where alcohol is the chief item of sale be stricken?
3. Does the prohibition on entering such businesses likewise violate the appellant’s constitutional right to freedom of association?

4. Did the sentencing court exceed its authority by requiring the appellant "to submit to physical and/or psychological testing" whenever requested by a CCO?

5. Must the community custody condition and order prohibiting contact with minors, including, appellant's own children, be stricken because the prohibition is not narrowly tailored or reasonably necessary to protect the children from harm?

B. STATEMENT OF THE CASE

The State charged appellant Michael Stephens with nine counts based on multiple incidents of sexual abuse of two stepdaughters, SDC and LLC, who lived in the home. He was also charged with fourth degree assault as to a third stepdaughter, AAC. CP 32-36, 40-41.

Stephens pled guilty to three counts of second degree child rape as to SDC and LLC. RP 3-8; CP 4, 21. The court dismissed the remaining charges. CP 7. The court ordered a presentence investigation (PSI) to be prepared for the sentencing hearing. RP 8; CP 45-53.

The court sentenced Stephens to a standard-range term of incarceration as well as lifetime community custody under RCW 9.94A.507. CP 8-9. Over a variety of objections by defense counsel, the court entered the community custody conditions recommended in the PSI

with a single slight modification. CP 19-20;<sup>1</sup> RP 11-14. The court also entered an order prohibiting contact with minors unless authorized by the Department of Corrections (DOC). CP 10.

Stephens timely appeals. CP 59-60.

C. ARGUMENT

1. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY PROHIBITING STEPHENS FROM POSSESSING ALCOHOL AND FORBIDDING HIM FROM ENTERING ANY PLACE WHERE ALCOHOL IS THE CHIEF ITEM FOR SALE.

Over defense objection, the court ordered Stephens to refrain from consuming and possessing alcohol and to “remain out of places where alcohol is the chief item of sale.” CP 19 (condition 9).

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). Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(e) specifically permits the court to order a defendant not to consume alcohol. Under RCW

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<sup>1</sup> The list of conditions is attached to this brief as an Appendix.

9.94A.703(3)(f), the trial court may also order the defendant to “comply with any crime-related prohibitions.”

A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Such a prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

While the SRA permits a court to prohibit the consumption of alcohol, the court went further and required that Stephens not *possess* alcohol and not enter certain businesses. This was error because these conditions were not “directly relate[d]” to the circumstances of the crimes of conviction. Parramore, 53 Wn. App. at 531.

The court found the condition appropriate because “there is a self report of some excessive use of alcohol which considering the nature of these charges certainly eliminates one’s natural inhibitions.” RP 13.

Here, the PSI recounted Stephens’s statements regarding his alcohol use: “[H]e drinks typically about once a month, when he drinks about 2 beers ‘typically.’ He also admits to the occasional drunk.”<sup>2</sup> CP

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<sup>2</sup> Defense counsel argued that “occasional drunk” was a typographical error and the author intended “occasional drink.” RP 12-13.

50. But the report contains no additional information regarding Stephens's alcohol use or its connection to his crimes. The certification for probable cause, relied on by the trial court in accepting Stephens's guilty plea, does not indicate alcohol was involved in the offenses. CP 29, 38-41.

In State v. Jones, the defendant pleaded guilty to first degree burglary and "other crimes," and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. 118 Wn. App. 199, 202-03, 76 P.3d 258 (2003). Nothing suggested that alcohol contributed to the defendant's offenses. Id. at 207-08. On appeal, the Court found the trial court had authority to prohibit alcohol consumption but it could not order the defendant to participate in alcohol counseling because the counseling was not related to the crime. Id. at 206-08. Similarly, before the SRA permitted the sentencing court to require any felony offender to abstain from the use of alcohol, this Court vacated such requirements where there was no evidence alcohol contributed to the offense. State v. Julian, 102 Wn. App. 296, 304-05, 9 P.3d 851 (2000) (no evidence alcohol related to first degree child molestation), review denied, 143 Wn.2d 1003 (2010).

Because there was no evidence, and the court did not specifically find, alcohol contributed to the offenses, the prohibitions were not valid

crime-related prohibitions. RCW 9.94A.030(10). The court therefore erred in prohibiting Stephens from possessing alcohol and entering businesses for which alcohol was the chief item for sale.

2. THE CONDITION FORBIDDING STEPHENS FROM ENTERING ANY PLACE WHERE ALCOHOL IS THE CHIEF ITEM OF SALE VIOLATES HIS CONSTITUTIONAL RIGHT TO FREEDOM OF ASSOCIATION

Citizens have a First Amendment right to free association, which includes the right to travel freely. U.S. Const. amends. I, XIV; Const. art. I, §§ 3, 4; Papachristo v. Jacksonville, 405 U.S. 156, 164-65, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); Tacoma v. Luvene, 118 Wn.2d 826, 840 n.5, 827 P.2d 1374 (1992). When a person is convicted of a crime, his right to free association may be limited while he is on community custody. State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), abrogated on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Any limitations on the right, however, must be “reasonably necessary to accomplish the essential needs of the State and public order.” In re Personal Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (quoting State v. Warren, 165 Wn.2d 17, 34, 195 P.2d 940 (2008)); accord, State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008) (infringement on constitutional rights must be authorized by SRA and

accomplish statutory goals of punishment and protection of the public); Riles, 135 Wn.2d at 350.

In Riles, defendant Gholston was convicted of raping a 19-year-old woman, but the sentencing court ordered him not to have contact with “any minor age children.” Riles, 135 Wn.2d at 349. Because there was no showing that children required special protection from Gholston, the Supreme Court found the condition “bears no relationship to the essential needs of the state and public order” and thus “at least borders on unconstitutional overbreadth.” Id. at 350. The Riles Court did not address the constitutional issue, however, having determined the no-contact order was not crime-related. Id. at 349-50.

There is no evidence the public will be protected if Stephens is prohibited from entering establishments where alcohol is the primary item for sale. Such infringement upon Stephens’s constitutional right to free association and travel must therefore be stricken.

3. THE CONDITION REQUIRING STEPHENS TO  
SUBMIT TO UNDEFINED PHYSICAL OR  
PSYCHOLOGICAL TESTING IS  
UNCONSTITUTIONALLY VAGUE.

Without discussion, the court ordered Stephens to “submit to physical and/or psychological testing whenever requested” by the CCO, at

Stephens's expense, to ensure compliance with the judgment and sentence and DOC requirements. CP 19 (condition 11).

Illegal or erroneous sentences may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. The condition that Stephens submit to unspecified physical and psychological testing is not among the mandatory, waivable, or discretionary conditions of community custody listed in RCW 9.94A.703. Nor is it found in RCW 9.94A.704, which lists conditions that may be imposed by the DOC. A trial court may, however, require an offender to undergo testing to assure compliance with the conditions of community custody. State v. Acevedo, 159 Wn. App. 221, 233, 248 P.3d 526 (2010) (upholding requirement that defendant submit to polygraph and/or urinalysis testing to ensure compliance with other community custody conditions); State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000) (polygraph testing may be used to monitor compliance with other conditions); Parramore, 53 Wn. App. at 531-32 (upholding urinalysis to monitor the defendant's illegal drug use as part of sentence for delivery of marijuana).

This Court will strike a community custody condition if it is manifestly unreasonable. Sanchez Valencia, 169 Wn.2d at 791-92. Unconstitutionally vague probation conditions are manifestly

unreasonable. Id. at 792. A probation condition is unconstitutionally vague if fails to protect against arbitrary enforcement. Id. at 791.

The condition imposed here does not limit the type of testing Stephens must undergo. Rather, it permits his CCO to require him to undergo and pay for any testing deemed necessary to ensure compliance with other requirements of his sentence or other unspecified DOC requirements. CP 19. Thus, by the terms of this order Stephens could be required to undergo any medical examination, psychological examination dictated by the CCO, including plethysmograph testing.

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Id. at 224; see U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Requiring submission to plethysmograph testing at the CCO's discretion would violate Stephens's constitutional right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013). Such testing is "extremely intrusive" and can be ordered only as part of crime-related treatment by a

qualified provider. Id. But such testing is not considered a routine monitoring tool subject only to the CCO's discretion. Id.

In summary, the condition is not tailored to Stephens's crime or to the other community custody conditions imposed in his case, nor is it limited to testing recognized as appropriate for this purpose. Instead, the condition gives the community corrections officer unfettered discretion to chose any physical or psychological testing that could conceivably monitor compliance with the judgment and sentence, or compliance with any as-yet unidentified DOC requirement. This Court should strike this condition of community custody and remand for the entry of an appropriately tailored condition. Rainey, 168 Wn.2d at 382.

4. THE ORDER PROHIBITING CONTACT WITH STEPHENS'S CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.

The court ordered Stephens not to have contact with minors under 18 except as authorized by his CCO. CP 19 (condition 6). The court also ordered in the judgment and sentence that Stephens not have "direct or indirect contact" with "children under 18 years unless expressly authorized by DOC." CP 10. Defense counsel objected, pointing out that Stephens had children with whom he wished to have contact. RP 12. These are MJS, a biological son who lived in the home but who was not a victim of the crimes of conviction, and RAS, an older son by a prior

marriage. CP 46, 49. The sentencing court declined to remove the condition, stating only, “There’s no indication that the biological children are victims in this particular incident but I think they’re entitled to the same protection.” RP 13.

RCW 9.94A.505(8) allows a sentencing court to “impose and enforce crime-related prohibitions and affirmative conditions” as provided in the SRA. A no-contact order as to a “class” of individuals must be “directly related” to the crime of conviction. RCW 9.94A.030(10); Warren, 165 Wn.2d at 32-33; Riles, 135 Wn.2d at 349. Similarly, a “crime-related” community custody prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished. RCW 9.94A.703(3)(f); Parramore, 53 Wn. App. at 531.

Stephens was convicted of offenses against girls who were not his own children. The prohibition on contact with all minors, including biological children of a different gender, is therefore not directly related to the circumstances of this crime. Riles, 135 Wn.2d at 349; see also State v. Letourneau, 100 Wn. App. 424, 442, 997 P.2d 436 (2000) (“The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights.”); but see

State v. Corbett, 158 Wn. App. 576, 599, 242 P.3d 52 (2010) (no contact order with biological children upheld where defendant offended against children for whom he acted as a parent). Accordingly, the no-contact order and identical community custody condition should be removed insofar as they apply to Stephens's own children. Riles, 135 Wn.2d at 349.

Alternatively, the challenged order and condition violate Stephens's constitutional rights because they are not narrowly tailored. A parent has a fundamental right to raise his children without state interference. U.S. Const. amend 14; State v. Ancira, 107 Wn. App. 650, 653, 27 P. 3d 1246 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). State interference with a fundamental right is subject to strict scrutiny. In re Parentage of C.A.M.A., 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005). In other words, any infringement must be narrowly tailored to serve a compelling interest. Id. at 61. As a result, a sentencing condition that interferes with a fundamental right must be "sensitively imposed," with "no reasonable alternative way to achieve the State's interest." Warren, 165 Wn.2d at 32; accord, Rainey, 168 Wn.2d at 377. There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93.

The State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Stephens was not convicted of committing a crime against his biological children, nor was he convicted of any crime against males. The State failed to argue, and the court failed to explain, why restrictions on contact were reasonably necessary to protect Stephens's sons. RP 10, 13

Reasonable necessity encompasses duration as well as scope (extent of contact). Rainey, 168 Wn.2d at 381. As explained in Rainey, "[t]he duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests." Id.

In Rainey, the defendant was convicted of a violent crime against his child (first degree kidnapping) and had a record of continually inflicting emotional damage on his daughter and attempting to leverage the child to inflict emotional distress on the mother. These facts were sufficient to establish that a total no-contact ban, including indirect or supervised contact, was reasonably necessary to protect the child and the mother. Id. at 379-80.

Nevertheless, the Court reversed the no-contact order because the sentencing court provided no justification for the order's lifetime duration, and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381.

Stephens's sons were 14 and nine years old at the time of Stephens plea. CP 46, 49. He will likely be incarcerated until they reach the age of majority. CP 8. But he wishes to have some form of contact with them. And even though the judgment and sentence states that all contact with minors is prohibited "unless expressly authorized by DOC,"<sup>3</sup> the default remains no contact. It is the sentencing court that has the duty to appropriately tailor the prohibition in the first instance. As in Rainey, the court provided no justification for the scope of the order, nor did the State attempt to justify the restriction as reasonably necessary to protect the children. The court therefore abused its discretion. Rainey, 168 Wn.2d at 375, 381-82.

In the event the condition and order are not stricken altogether, they must be modified so that they are narrowly tailored to interfere minimally with Stephens's right to parent. Warren, 165 Wn.2d at 32.

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<sup>3</sup> CP 10.

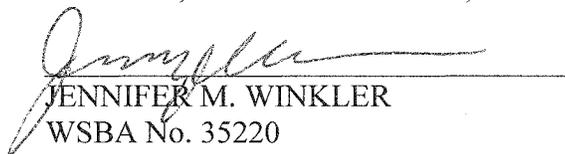
D. CONCLUSION

The challenged community custody conditions should be vacated or modified to comply with constitutional and statutory requirements.

DATED this 22<sup>nd</sup> day of November, 2013.

Respectfully submitted,

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