

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

NO. 45230-8-II

CLALLAM COUNTY CAUSE NO. 13-1-00114-3

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL STEPHENS,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
I. Counterstatement of the Issues.....	1
II. Statement of the Case.....	2
III. Summary of Argument.....	2
IV. Argument.....	3
ISSUE ONE: The State concedes that the alcohol restriction is not supported by the facts of the case.....	6
ISSUE TWO: The State concedes condition is overly broad; remand to clarify the condition is appropriate.....	7
ISSUE THREE: The trial court did not err when it entered a no contact order with minors under the age of 18 without the consent of DOC or CCO.....	9
V. Conclusion.....	15
Certificate of Delivery.....	16

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<i>First United Methodist Church v. Hr'g Exam'r</i> , 129 Wn.2d 238, 916 P.2d (1996).....	10
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	4
<i>State v. Autrey</i> , 136 Wn. App. 460, 150 P.3d 580 (2006).....	5
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	10
<i>State v. Corbett</i> , 158 Wn.App. 576, 242 P.3d 52 (2010).....	10, 12-14
<i>State v. Pillatos</i> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	4
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998)...	4, 5, 8, 14
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	4, 14
<i>State v. Snedden</i> , 166 Wn.App. 541, 271 P.3d 298 (2012).....	3
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010)..	10-11
<i>State v. Zimmer</i> , 146 Wn. App. 405, 190 P.3d 121 (2008).....	5

Federal Cases

<i>United States v. Consuelo-Gonzalez</i> , 521 F.2d 259	
--	--

(9th Cir. 1975).....4

Statutes

RCW 9.94A.030(10).....5, 7

RCW 9.94A.701(3)(c).....5

RCW 9.94A.703(3)(e), (f).....5

I. Counterstatement of the Issues:

ISSUE ONE

Was a condition of supervision requiring Mr. Stephens to abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale supported by the facts of the case?

ISSUE TWO

Is a condition of supervision requiring Mr. Stephens to “submit to physical and/or [sic] psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections’ requirements” vague and overly broad?

ISSUE THREE

Was the trial court acting within its responsibility to protect children when it imposed a sentencing condition that Mr. Stephens “not have direct or indirect contact with the following specified class of individuals: children under the age of 18 years unless expressly authorized by DOC.”

II. Statement of the Case

The State accepts Mr. Stephens' statement of the case.

III. Summary of Argument

Mr. Stephens challenges four conditions of sentencing. The State concedes that the community care condition 9, CP 19– that he not consume alcohol or go any place where it is the chief item of sale – is not supported by the facts. There is little information showing that Mr. Stephens consumed alcohol. There is no information that Mr. Stephens's illicit behavior was the result of alcohol consumption. This Court should remand the case to remove the condition unless the State can prove it is reasonably necessary.

The State concedes that community caretaking custody provision 11, CP 19, is overly broad. Provision 13, CP 19, may adequately address the concerns covered by the condition. This Court should remand the case to clarify exactly what testing is necessary, in light of testing required in the sex offender treatment required in condition 13.

The State does not agree with Mr. Stephens that the provision he have no contact with the class of minors “unless expressly authorized by DOC” (condition 7, CP 10), or the community custody condition he have “no contact or communicate with minors under the age of 18 except as previously authorized by CCO” (condition 6, CP 19) is ripe for review or not reasonably related to the State’s responsibility to protect children.

IV. Argument

Standard of Review: Whether the trial court had statutory authority to impose a community custody condition is reviewed *de novo*. Whether the trial court properly determined the condition is reasonably crime-related is reviewed for an abuse of discretion. *State v. Snedden*, 166 Wn.App. 541, 271 P.3d 298 (2012).

Analysis: The Sentencing Reform Act permits a trial court to impose crime-related prohibitions up to and including the maximum sentence for the crime committed. *State v. Warren*,

165 Wn.2d 17, 32, 195 P.3d 940 (2008):

Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(13). This court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonably crime related. *Id.* at 36-37, 846 P.2d 1365.

More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. *See State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. *Id.* Additionally, conditions that interfere with fundamental rights must be sensitively imposed. *Riley*, 121 Wn.2d at 37, 846 P.2d 1365 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975)).

Because it is solely the legislature’s province to fix legal punishments, the legislature must authorize any community custody condition. *State v. Pillatos*, 159 Wn.2d 459, 469, 150

P.3d 1130 (2007). Pursuant to Mr. Stephens's lifetime sentence, the sentencing court may order the defendant to (1) "[r]efrain from consuming alcohol[,]" and (2) "[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(e), (f), for his entire lifetime. "A 'crime-related prohibition' is an order prohibiting conduct that *directly relates to the circumstances of the crime.*" *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (quoting *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006)) (emphasis included). Additionally, a sentencing court may require the defendant to perform certain affirmative acts that are necessary to monitor compliance with its orders. RCW 9.94A.030(10). *See also State v. Riles*, 135 Wn.2d 326, 340, 957 P.2d 655 (1998) (polygraphs and urinalyses are monitoring tools rather than actual conditions of community placement).

Mr. Stephens raises four challenges to either court imposed sentencing conditions or community custody conditions imposed as a result of his conviction of three Class A felonies. They include a court-imposed prohibition against

possessing alcohol or entering any place where alcohol is the chief item of sale; the requirement he submit to undefined and vague physical or psychological testing; and the condition prohibiting him from having contact with his children.

ISSUE ONE

Was a condition of supervision requiring Mr. Stephens to abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale supported by the facts of the case?

Mr. Stephens contends these two conditions are not supported by facts in the record showing he abused alcohol. The State agrees and concedes that this condition is not supported by any facts in the record. Whether Mr. Stephens drank more or less than he indicated in response to the alcohol use question,¹ nothing in the record shows he consumed alcohol before raping his step-daughters.

ISSUE TWO

Is a condition of supervision requiring Mr. Stephens to “submit to physical and/or [sic] psychological testing whenever

¹ That he “typically” drinks two beers about once a month is inconsistent with an “occasional drunk” episode.

requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections' requirements" vague and overly broad?

Mr. Stephens argues the requirement that he undergo unspecified physical and/or psychological testing to ensure compliance with his court ordered condition is unconstitutionally vague. *See* Brief of Appellant at 7-10. He asserts the expansive wording of the challenged condition permits a corrections officer to capriciously subject him to any physical and/or psychological testing, including plethysmograph testing.

As previously stated, the sentencing court may require the defendant to perform certain affirmative acts that are necessary to monitor compliance with its orders. RCW 9.94A.030(10). *See also State v. Riles*, 135 Wn.2d at 340, 957 P.2d 655 (polygraphs and urinalyses are monitoring tools rather than actual conditions of community placement). Here, the sentencing court ordered Mr. Stephens to "submit to physical

and/or psychological testing whenever requested by Community Corrections Officers” at his own expense. CP 19, condition 11. The State concedes this language is overly expansive. Because remand is appropriate to correct the condition pertaining to alcohol, the State has no objection to the sentencing court clarifying why such expansive monitoring is appropriate.

The State also considers the condition unnecessarily invasive because Mr. Stephens is also required to comply with and complete sex offender treatment:

13) You shall undergo, maintain progress in, and successfully complete an in-patient/out-patient sex offender treatment as set forth here: obtain a psychosexual evaluation within 30 days of release, enter into, comply with and successfully complete any recommended treatment resulting from this evaluation.
(CP 19)

Sex offender treatment and a psychosexual evaluation may contain the same tests. Condition 13, CP 19, contains the unstated assumption that failure to comply with sex offender treatment, which may include some of the same testing as

condition 11, will be termed a violation of his community custody conditions. Condition 13 is appropriate and may be sufficient to ensure that Mr. Stephens is treated for his sexual deviancy. The trial court will be able to clarify when and if further testing is appropriate.

ISSUE THREE

Was the trial court acting within its responsibility to protect children when it imposed a sentencing condition that Mr. Stephens "not have direct or indirect contact with the following specified class of individuals: children under the age of 18 years unless expressly authorized by DOC."

Mr. Stephens asserts he should be permitted to have contact with his two sons, one of which he has not seen in approximately 15 years (as of now) and one who is now approximately 10 except when authorized by DOC or Community Corrections.

Initially, this issue does not appear to be ripe for review. Although Mr. Stephens argues the condition creates a blanket prohibition that he have no contact with his two sons, neither prohibition reads in that manner. In both prohibitions, Mr.

Stephens may have contact with any minor child when previously authorized by DOC or CCO (CP 10, 19). Unless DOC informs Mr. Stephens he cannot see or communicate with his sons, his concern is not presently a matter for judicial review. Later, when Mr. Stephens is on community supervision, neither son will be a minor under the age of 18 (CP 19). *See, e.g., State v. Corbett*, 158 Wn.App. 576, 501, n. 14, 242 P.3d 52 (2010) (children will no longer be minors under the age of 18 by the time defendant is eligible for community custody release).

State v. Valencia, 169 Wn.2d 782, 788-791, 239 P.3d 1059 (2010), applied the ripeness test created in *State v. Bahl*, 164 Wn.2d 739, 740, 193 P.3d 678 (2008)². Applying the first prong, whether the issue raised by Mr. Stephens is a purely

² “Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *First United Methodist Church v. Hr’g Exam’r*, 129 Wn.2d 238, 255-56, 916 P.2d (1996) (internal quotation marks omitted). The court must also consider “the hardship to the parties of withholding court consideration.” *Id.*, at 255, 916, P.2d 374 (internal quotation marks omitted).

legal challenge, the Supreme Court stated the test is whether the defendant's contention will change between now and the time he is released from prison. *State v. Valencia*, 169 Wn.2d at 788, 239 P.3d 1059. Whether DOC does not permit him communication or contact with his two sons is variable and may change as time passes. DOC may or may not withhold contact with his minor sons during the period of incarceration. During the time of his imprisonment, DOC will control contact with his sons, which means this contention may change between now and the time he is released from prison.

The second prong of the ripeness test is also not met. To be ripe for review, the issue cannot require further factual development. *State v. Valencia*, 169 Wn.2d at 788, 239 P.3d 1059. Mr. Stephens will be required, over the course of his incarceration and up to the time the children reach age 18, to show he is being denied access to his two sons. The issue will require further factual development.

The third prong is decisive: Whether the challenged

action is final. *State v. Valencia*, 169 Wn.2d at 789, 239 P.3d 1059. Because DOC has authority to permit contact, Mr. Stephens cannot claim he is prohibited from contact or communications with his sons. When DOC has authority to permit or deny contact, there is no finality in the condition.

Even if, on the other hand, the issue is ripe for review, the condition in the judgment and sentence is appropriate under the facts of this case. The restriction is specifically tailored to protect a class of individuals that may be harmed by contact with Mr. Stephens and therefore does not violate his fundamental right to association or to parent. A more restriction condition³ and a total prohibition against contact “with children under the age of 18 for any reason” were held to be appropriate crime related prohibitions in *State v. Corbett*, 158 Wn.App. 576, 586, 242 P.3d 52 (2010).

The facts in *Corbett* parallel the facts in this case. The

³ “No contact with any minors without prior approval of the [Department of Corrections /Community Corrections Officer]...and Sexual Deviancy Treatment Provider.” *State v. Corbett*, 158 Wn.App. at 586, 242 P.3d 52.

child's mother worked full time while the defendant cared for her two children. *Id.*, at 582, 242 P.3d 52. Corbett also ejaculated in a child's mouth. *Id.*, at 583, 242 P.3d 52. After a jury convicted Corbett, the trial court imposed the two community caretaking conditions related above. *Id.*, at 586, 242 P.3d 52. Corbett claimed the prohibitions were not crime related. *Id.*, at 597, 242 P.3d 52. The appellate court determined they were:

The no-contact order is reasonably necessary to protect Corbett's children because of his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children.

Id., at 599, 242 P.3d 52.

In Mr. Stephen's case, the evidence of his abuse of trust is even more prevalent. Mr. Stephens admitted (CP 41) he used his position in a parental role to gain access to his victims. His admissions show he exercised almost no self control in the parenting of the children, sexually abusing or physically abusing all of them. Ensuring that DOC is able to monitor the conditions of his contact with his minor sons is appropriate.

Mr. Stephens also claims the restriction affects his fundamental right to parent because the no contact orders are not narrowly tailored to protect his right to parent. *State v. Riles*, 135 Wn.2d at 347, 957 P.2d 655998) reads that the court has authority to restrict a fundamental right “if reasonably necessary to accomplish the essential needs of the state and public order,” citing to *State v. Riley*, 121 Wn.2d at 37-38, 846 P.2d 1365. This condition – that Mr. Stephens obtain DOC permission before having contact with his sons – promotes order but still permits him to seek contact with them.

Moreover, *Riles* and *Corbett* upheld a no contact provision with children of both sexes, even though each defendant had abused children of one sex. The victim in *Riles* was a single, young boy, but the Supreme Court upheld a restriction that defendant have no contact with “any minor-age children w/o approval of CCO and mental health treatment counselor.” *State v. Riles*, 135 Wn.2d at 333, 957 P.2d 655. In *Corbett*, the same restriction (no contact with minors without

permission from DOC or CCO) was upheld, even though the victim was female. In both cases, the courts held that a trial court had authority to protect a group of children from predatory behavior, but held that contact could occur if approved by DOC or a treatment counselor. The issue is not, therefore, whether Mr. Stephens only abused the two or three females in his care, but whether Mr. Stephens should be trusted around children without prior approval because he abused his parental role to take advantage of children. The restriction requiring prior approval by DOC is appropriate.

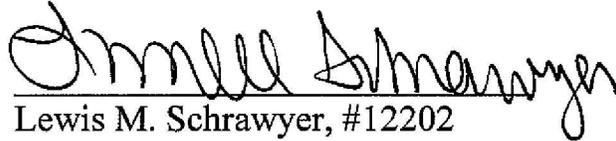
CONCLUSION

Even if the Court accepts the State's concessions to the first two challenged conditions, the State urges the Court to uphold the no contact provisions, holding neither condition is ripe (nor is it likely the CCO condition 6, CP 19, ever will be). If the DOC condition is ripe, the State urges the Court to find it appropriate.

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Respectfully submitted this March 21, 2014.

WILLIAM B. PAYNE, Prosecutor



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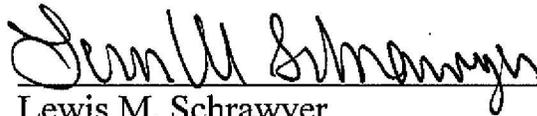
CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to:

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