

No. 46897-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Crocker,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-00873-0

The Honorable Judge Stephen Warning

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 3

**I. The sentencing court erred by refusing to “wash out”
Mr. Crocker’s 1999 conviction based on an Oregon
littering conviction that would have been a civil
infraction in Washington..... 3**

**II. The court exceeded its authority by ordering Mr.
Crocker to pay his legal financial obligations within 24
months as a condition of his community custody..... 6**

CONCLUSION 7

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

State v. Hayes, --- Wn.2d ---, 342 P.3d 1144 (February 5, 2015)..... 4

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)..... 5

State v. Slattum, 173 Wn. App. 640, 295 P.3d 788 (2013) *review denied*,
178 Wn.2d 1010, 308 P.3d 643 (2013)..... 5

State v. Warnock, 174 Wn. App. 608, 299 P.3d 1173 (2013)..... 6, 7

WASHINGTON STATUTES

RCW 69.50.401 4

RCW 70.93.060 3, 4

RCW 9.94A.010..... 4

RCW 9.94A.525..... 4, 5

RCW 9.94A.703..... 7

OTHER AUTHORITIES

ORS 164.805..... 3

ISSUES AND ASSIGNMENTS OF ERROR

1. The court miscalculated Mr. Crocker's offender score.
2. The court erred by finding that Mr. Crocker's 1999 drug conviction did not "wash out" for sentencing purposes.
3. Mr. Crocker's Oregon conviction for littering should not have prevented washout of his 1999 conviction because it would not have constituted a crime in Washington.

ISSUE 1: A prior class C felony does not add a point to an offender score if the person has spent at least five years in the community without committing any other crimes. Here, the court held that Mr. Crocker's 1999 conviction did not wash out because he had a subsequent conviction for littering in Oregon; even though his conduct would not have constituted a crime in Washington. Did the court miscalculate Mr. Crocker's offender score?

4. The court exceeded its authority by ordering Mr. Crocker to pay all legal financial obligations within 24 months of his conviction as a condition of his community custody.
5. No statute authorizes the court to condition community custody on payment of legal financial obligations.
6. The court erred by checking the box next to the condition regarding payment of legal financial obligations in section 4.5 of the Judgment and Sentence.

ISSUE 2: A sentencing court exceeds its authority by imposing a condition of community custody that is not specifically authorized by statute. Here, the court imposed a community custody condition requiring Mr. Crocker to pay all legal financial obligations within 24 months of his conviction. Did the court overstep its sentencing authority by ordering a community custody condition that is not sanctioned by statute?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Christopher Crocker plead guilty to attempted eluding and theft three. CP 5-14. The court held a sentencing hearing, at which a single issue was contested. RP 6-18.

The state claimed that Mr. Crocker's points totaled six, while the defense argued five. The prosecutor urged the court to count a prior possession of heroin conviction, which the defense argued had washed. RP 7-9.

The only item on Mr. Crocker's record from the relevant period was an Oregon conviction for littering. The defense argued that since littering is not a criminal offense in Washington, it cannot prevent washout. RP 9-10; CP 15-17.

The court ruled that the Oregon conviction keeps the possession from washing out. RP 12; CP 21.

Without argument or comment, the Judgment and Sentence checked a box in the "confinement" section that read:

That the defendant must have his/her legal financial obligations paid within [24] months. Payments to be made as set forth in paragraph 4.1 of this Judgment and Sentence, unless other arrangements have been made with the Cowlitz County Superior Court Collection Agency.
CP 27.

Mr. Crocker timely appealed. CP 19-30, 31-46.

ARGUMENT

I. THE SENTENCING COURT ERRED BY REFUSING TO “WASH OUT” MR. CROCKER’S 1999 CONVICTION BASED ON AN OREGON LITTERING CONVICTION THAT WOULD HAVE BEEN A CIVIL INFRACTION IN WASHINGTON.

In Washington State, littering is a civil infraction unless the state proves that the amount of material littered was at least one cubic foot. RCW 70.93.060(2)(a)-(c). In Oregon, however, littering is a misdemeanor regardless of the quantity of matter. ORS 164.805.

Mr. Crocker was convicted of littering in Oregon in 2009. CP 2. The prosecutor admitted that the state could not prove that Mr. Crocker’s offense would have been a misdemeanor in Washington, rather than a civil infraction. RP 8.

The state also agreed that, but for the littering conviction, Mr. Crocker’s 1999 drug conviction would have “washed out” and would not have been included in his offender score. CP 2; RP 8.

There was no evidence that Mr. Crocker spent any time in jail as a result of the Oregon littering. *See RP generally*; CP 1-2. Still, the trial court concluded that the Oregon littering did not prevent washout because Mr. Crocker was not “in the community” when he committed it. RP 11-12. The court erred by concluding that an offense that would not have

been a crime if committed in Washington prevented washout of Mr. Crocker's 1999 conviction.

An offender score is calculated based on the number of felony convictions existing before the date of sentencing. RCW 9.94A.525(1). A conviction may "wash out" of the offender score. RCW 9.94A.525(2). Prior convictions for class C felonies are not included in an offender score if the offender spent five consecutive years in the community without committing "any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c).¹

Here, Mr. Crocker's littering offense would not have been a "crime" if it had occurred in Washington. RCW 70.93.060(2). Accordingly, it is not a "crime" under RCW 9.94A.525(2)(c) and should not prevent his 1999 conviction from washing out.

The purpose of the Sentencing Reform Act (SRA) is to create uniformity among felony sentences. *State v. Hayes*, --- Wn.2d ---, 342 P.3d 1144, 1146 (February 5, 2015); RCW 9.94A.010(1), (3). The legislature's objective was to create a system in which similarly-situated offenders would receive similar sentences. *Id.*; RCW 9.94A.010(3).

¹ Mr. Crocker's 1999 conviction was for manufacturing marijuana, which is a class C felony. RCW 69.50.401(2)(c). Accordingly, the conviction would have washed out if Mr. Crocker could demonstrate five years without committing any crimes. RCW 9.94A.525(2)(c).

Had Mr. Crocker been caught littering less than a cubic foot of material in Washington State, he would not have been convicted of a crime and his 1999 conviction would have washed out. By preventing the conviction from washing based on the same conduct in Oregon, the trial court violated the SRA's intention of uniformity in sentencing.

If a criminal statute is ambiguous, the rule of lenity requires the court to construe it in favor of the accused. *State v. Slattum*, 173 Wn. App. 640, 643, 295 P.3d 788 (2013) *review denied*, 178 Wn.2d 1010, 308 P.3d 643 (2013). The rule of lenity applies equally to sentencing statutes. *See e.g. State v. Jacobs*, 154 Wn.2d 596, 599, 115 P.3d 281 (2005). A statute is ambiguous if it is subject to more than one reasonable interpretation. *Id.* at 600-01.

At best, the statutory reference to “any crime that subsequently results in a conviction” is ambiguous. *Id.*; RCW 9.94A.525(2)(c). It could reasonably mean either (a) any offense that would be punishable as a crime in Washington or (b) any offense that is punishable as a crime in the jurisdiction in which it is committed.

If this court does not find that the plain language of the statute precludes an offense that would be a civil infraction in Washington from preventing washout, then the provision is ambiguous. As such, the rule of lenity requires that it be construed in favor of Mr. Crocker. *Id.*

The court erred by increasing Mr. Crocker's offender score by finding that his Oregon littering offense prevented washout of his 1999 conviction. Mr. Crocker's case must be remanded for resentencing.

II. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. CROCKER TO PAY HIS LEGAL FINANCIAL OBLIGATIONS WITHIN 24 MONTHS AS A CONDITION OF HIS COMMUNITY CUSTODY.

The trial court found Mr. Crocker indigent at the beginning and end of the proceedings. CP 47-49. Even so, it ordered him to pay \$1,775 in legal financial obligations (LFOs). CP 25. The court required Mr. Crocker to pay a minimum of \$25 per month, starting immediately. CP 26.

But the court also added a condition to Mr. Crocker's community custody requiring him to pay his LFOs in full within 24 months of the date of the Judgment and Sentence.² CP 27. This period appears to include the 12 months of Mr. Crocker's incarceration. CP 27.

The trial court does not have power to impose community custody conditions unless they are authorized by statute. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

² The Judgment and Sentence provides that all payments must be made in accordance with paragraph 4.1. CP 27. But paragraph 4.1 does not say anything about LFOs. CP 23-24. Section 4.3, on the other hand, outlines the LFOs the court imposed and payment schedule. CP 25-26.

RCW 9.94A.703 lays out the conditions a trial court has the authority to impose. RCW 9.94A.703. The statute does not permit a court to condition community custody on payment of legal financial obligations. RCW 9.94A.703.

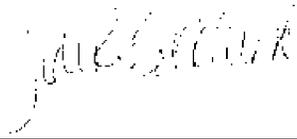
The trial court exceeded its authority by ordering Mr. Crocker to pay his LFOs within 24 months as a condition of his community custody when no statute authorized that condition. *Warnock*, 174 Wn. App. at 611. This case must be remanded and that condition stricken. *Id.* at 614.

CONCLUSION

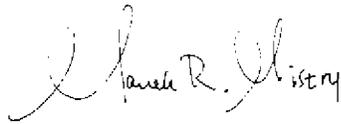
The court erred by ruling that an offense that would be a civil infraction in Washington could prevent washout of a conviction that would otherwise not add a point to Mr. Crocker's offender score. The court also exceeded its authority by requiring Mr. Crocker to pay all LFOs within 24 months as a condition of his community custody. Mr. Crocker's case must be remanded for resentencing and to strike the condition from his Judgment and Sentence.

Respectfully submitted on March 31, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Christopher Crocker, DOC #378383
Washington Corrections Center
PO Box 900
Shelton, WA 98584

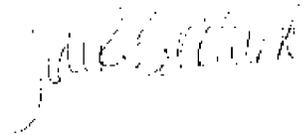
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 31, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

March 31, 2015 - 10:19 AM

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