No. 47169-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK MITCHELL DETWILER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court did not have statutory authority to prohibit Mr. Detwiler from consuming marijuana as a condition of his suspended sentence.

2. The sentence condition regarding consumption of marijuana was unconstitutionally vague in violation of due process.

3. The trial court abused its discretion in revoking the Special Sex Offender Sentencing Alternative (SSOSA) suspended sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The SSOSA statute provides a court with authority to prohibit an offender from using marijuana as a condition of the suspended sentence only if the offender's marijuana use was "crime-related" or a known "precursor" behavior that led to criminal activity. Here, the record does not show that Mr. Detwiler's use of marijuana was "crime-related" or was a precursor to the crime. Did the court act without statutory authority in requiring Mr. Detwiler to abstain from using marijuana he obtained with a lawful prescription as a condition of the suspended sentence?

2. A sentencing condition is unconstitutionally vague if it does not define the violation with sufficient definiteness that ordinary people

can understand what conduct is proscribed. Here, some of the sentencing conditions stated that Mr. Detwiler could use marijuana obtained with a lawful prescription, while other conditions stated that marijuana use was prohibited, without specifying whether a lawful prescription was required. Are these conditions unconstitutionally vague to the extent they do not make clear whether Mr. Detwiler could use marijuana that he obtained with a lawful prescription?

C. STATEMENT OF THE CASE

Frederick Detwiler was charged with one count of rape of a child in the first degree. CP 4. He pled guilty. CP 5-14. The prosecutor agreed to recommend that the court impose a Special Sex Offender Sentencing Alternative (SSOSA). CP 9.

In order to determine whether Mr. Detwiler was amenable to treatment, Michael Comte performed a psychosexual evaluation and proposed a recommended treatment plan. CP 52-65. Mr. Comte noted that Mr. Detwiler reported using marijuana on a daily basis from the time he was 15 years old. CP 58. Mr. Comte recommended Mr. Detwiler be prohibited from using marijuana or other mind-altering substances. CP 64. But Mr. Comte did not state—and there is no

evidence in the record to show—that Mr. Detwiler's use of marijuana contributed to the offense.

At sentencing, the court imposed a SSOSA as recommended by the parties and in light of Mr. Comte's evaluation. CP 23-24. The court imposed an indeterminate sentence of 131.9 years to life, suspending all but 12 months of the sentence and imposing a life term of community custody. CP 23.

The court imposed several sentencing conditions in various portions of the judgment and sentence. Some pertained to the use of controlled substances. In three separate conditions, the court ordered that Mr. Detwiler was permitted to use controlled substances if he had "lawfully issued prescriptions." CP 30 (Appendix F); CP 31 (Appendix G); CP 35 (Appendix H).

Yet other portions of the judgment and sentence contained conditions prohibiting the use of marijuana without mentioning whether a lawfully issued prescription was required. In Appendix G, the court ordered that Mr. Detwiler "[c]omply with all treatment provider & CCO conditions & requirements," and stated that "[t]he treatment program shall include the requirements/conditions set forth in Michael A. Comte's evaluation on pages 13-14 and attached hereto."

CP 31. The attached pages from Mr. Comte's evaluation include his recommendation that Mr. Detwiler "be prohibited from possessing and consuming alcohol and mind-altering substances, including marijuana." CP 32. Likewise, in Appendix H, the court ordered: "Do not purchase, possess, or consume alcohol or marijuana." CP 35.

After serving 12 months in jail, Mr. Detwiler was released on October 10, 2014. 1/16/15RP 7. His community corrections officer (CCO), Merriam Nichols, conducted a home visit on November 26. 1/16/15RP 10. At that time, Mr. Detwiler informed Ms. Nichols that he was seeking to obtain a "green card" from his physician, which would allow him to use marijuana for medical purposes. 1/16/15RP 10. A "green card" is equivalent to a legal prescription, obtained from a physician, which authorizes the use of marijuana for medical treatment. 1/16/15RP 10; see ch. 69.51A RCW. Ms. Nichols told Mr. Detwiler she thought he was not allowed to use marijuana as a condition of his community custody. 1/16/15RP 10-11. She said she would double-check his conditions and determine whether he was indeed prohibited from using marijuana. 1/16/15RP 10-11.

Later that day, Mr. Detwiler telephoned Ms. Nichols and left a voicemail message stating he had reviewed his conditions and

understood they did not prohibit him from using marijuana as long as he had a legal prescription. 1/16/15RP 11. Ms. Nichols did not return his call. 1/16/15RP 17.

The next time Mr. Detwiler and Ms. Nichols spoke was at his scheduled report date at the Department of Corrections office on December 3. 1/16/15RP 12. At that time, Ms. Nichols told Ms. Detwiler she had reviewed his judgment and sentence and believed Appendix H contained a condition prohibiting him from using marijuana even with a legal prescription. 1/16/15RP 12. Mr. Detwiler informed Ms. Nichols he had obtained a green card and had consumed marijuana on two occasions, on December 1 and 2. 1/16/15RP 13, 18-19.

Ms. Nichols discussed the matter with her supervisor and together they decided to take Mr. Detwiler into custody immediately. 1/16/15RP 13. Mr. Detwiler was transported to jail. 1/16/15RP 13. He signed an admission form acknowledging he had used marijuana on December 1 and 2. 1/16/15RP 15.

The State filed a petition requesting that Mr. Detwiler's suspended sentence be revoked. CP 37-38.

A hearing was held. Mr. Detwiler testified he had obtained a valid green card from a physician at a medical clinic. 1/16/15RP 23-24. He wanted to use marijuana as an alternative to prescription pain medication. 1/16/15RP 23. Mr. Detwiler has suffered from chronic back pain and migraine headaches ever since he jumped from a moving car at the age of 18 and cracked his skull. CP 56. Mr. Detwiler believed the green card gave him the right to use marijuana for medical purposes such as pain relief. 1/16/15RP 24.

Mr. Detwiler explained he had reviewed the conditions of his sentence before obtaining the green card. 1/16/15RP 25-26. He thought the condition in Appendix G, which states, "[t]he defendant shall not consume controlled substances except pursuant to lawfully issued prescriptions," CP 31, provided him with permission to use marijuana if he had a legal prescription for it. 1/16/15RP 25-26.

Mr. Detwiler's treatment provider was willing to continue to work with him despite his use of marijuana on two occasions. 1/16/15RP 33.

Nonetheless, the trial court ruled it was "clear" from the judgment and sentence that Mr. Detwiler was prohibited from using

marijuana under any circumstances. 1/16/15RP 35. The court therefore revoked the suspended sentence. 1/16/15RP 36; CP 45-46.

D. ARGUMENT

1. The court did not have statutory authority to prohibit Mr. Detwiler from using marijuana obtained with a lawfully issued prescription as a condition of his SSOSA—or to revoke the SSOSA based on a violation of that condition—because the condition was not crime-related

a. A sentencing court may prohibit an offender from using marijuana obtained with a lawful prescription as a condition of a SSOSA only if the prohibition is "crime-related"

A sentencing court's authority is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). This Court reviews *de novo* whether the trial court had statutory authority to impose a challenged sentencing condition. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). An offender may challenge an erroneous sentencing condition for the first time on appeal. Bahl, 164 Wn.2d at 744.

The Sentencing Reform Act (SRA) authorizes a trial court to impose a suspended sentence for certain first-time sex offenders who

are amenable to treatment under the special sex offender sentencing alternative, RCW 9.94A.670. The statute provides a court the option of imposing a SSOSA if the court determines that suspending the sentence and ordering treatment would be in the best interests of the offender and the community. State v. Jackson, 61 Wn. App. 86, 92-93, 809 P.2d 221 (1991); RCW 9.94A.670(4).

If the court determines an offender is eligible for a SSOSA, the court may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670(3). The examiner's report must include "[r]ecommended crime-related prohibitions and affirmative conditions." RCW 9.94A.670(3)(b)(v). The examiner's recommended crime-related conditions "must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances." Id.

If the offender is amenable to treatment and the court decides to grant a SSOSA, the court imposes a term of confinement of up to twelve months, suspends the remainder of the sentence, and imposes a term of community custody "equal to the length of the suspended

sentence, the length of the maximum term imposed pursuant to RCW 9.94A.507, or three years, whichever is greater." RCW 9.94A.670(5)(a), (b). The court must also order the offender to participate in treatment in the community for any period up to five years in duration. RCW 9.94A.670(5)(c).

The statute provides the court authority to impose certain "conditions of the suspended sentence." RCW 9.94A.670(5), (6). First, the court must impose "[s]pecific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified" by the examiner in the proposed treatment plan. RCW 9.94A.670(5)(d). The court also has discretion to impose other "[c]rime-related prohibitions." RCW 9.94A.670(6)(a). Finally, during the term of community custody, the court must "require the offender to comply with any conditions imposed by the department under RCW 9.94A.703." RCW 9.94A.670(5)(b).

RCW 9.94A.703 is the general statute pertaining to community custody conditions in felony sentencing. Generally, that statute does not provide authority to order an offender to refrain from engaging in otherwise lawful behavior during community custody unless the prohibition is "crime-related." RCW 9.94A.703(3)(f) ("As part of any

term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions."); State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 65 (1998), overruled in part on other grounds by State v. Valencia, 169 Wn2d 782, 239 P.3d 1059 (2010). Two limited exceptions exist in regard to the use of intoxicating substances. First, the court may order the offender to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c). Second, the court may order an offender to "[r]efrain from consuming alcohol" during community custody, even if alcohol did not contribute to the offense. RCW 9.94A.703(3)(e); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

Thus, a court imposing a SSOSA has statutory authority to impose three kinds of conditions of the suspended sentence which are relevant to this case. First, the court has authority to impose "[s]pecific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified" by the examiner in the proposed treatment plan. RCW 9.94A.670(5)(d). Second, the court may impose "[c]rime-related prohibitions." RCW 9.94A.670(6)(a). Third, the court must "require the offender to comply with any conditions imposed by

the department under RCW 9.94A.703." RCW 9.94A.670(5)(b). In regard to the use of intoxicating substances, RCW 9.94A.703 provides authority only to prohibit the consumption of alcohol, RCW 9.94A.703(3)(e), or the consumption of marijuana obtained without a lawfully issued prescription, RCW 9.94A.703(2)(c).

In sum, the court had authority to prohibit Mr. Detwiler from using marijuana obtained with a lawful prescription as a condition of the suspended sentence only if his use of marijuana was a "known precursor activit[y] or behavior" identified by the examiner, or if his use of marijuana was "crime-related." RCW 9.94A.670(5)(a), (b), (d). 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). In order to justify a crime-related prohibition, the court must find and the record must show that the conduct to be prohibited "contributed to the offense." State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000).

Here, the court acted without statutory authority because Mr. Detwiler's use of marijuana was neither "crime-related" nor a "known precursor" activity identified by the examiner. There is no evidence to show Mr. Detwiler's use of marijuana *directly* contributed to the

offense. Although Mr. Detwiler admitted using marijuana on a daily basis from the age of 15, there is no evidence to show that his use of marijuana induced him to commit the crime or otherwise contributed to it.

Likewise, the examiner did not identify Mr. Detwiler's use of marijuana as a "precursor" to the crime. The examiner recommended that Mr. Detwiler be prohibited from using marijuana, in order to facilitate treatment and help him learn how to gain "control of his sexual and other impulses." CP 59. But the examiner did *not* state that Mr. Detwiler's use of marijuana was a "precursor" activity or had otherwise induced his criminal behavior.

Thus, because Mr. Detwiler's use of marijuana was neither "crime-related" nor a known "precursor" to criminal activity, the court did not have statutory authority to prohibit him from using marijuana—obtained with a lawful prescription—as a condition of the suspended sentence.

b. The trial court abused its discretion in revoking Mr. Detwiler's suspended sentence

"Loss of a SSOSA is a significant consequence to defendants." State v. Sims, 171 Wn.2d 436, 443, 256 P.3d 285 (2011). A court

abuses its discretion in revoking a SSOSA if the revocation is based upon an error of law. State v. Miller, 159 Wn. App. 911, 918, 247 P.3d 457 (2011).

The statute provides authority for a court to revoke a SSOSA under only two circumstances. The court may revoke a SSOSA and order execution of the sentence only if: (a) the offender violates a condition of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. RCW 9.94A.670(11); State v. McCormick, 166 Wn.2d 689, 698, 213 P.3d 32 (2009).

On the other hand, if the offender violates a condition of the sentence that is *not* a statutorily authorized condition of the suspended sentence, the department may impose other lesser sanctions, such as ordering the offender to serve up to 30 days in jail. RCW 9.94A.670(12); RCW 9.94A.633(1).

As discussed, the court was not authorized to prohibit Mr. Detwiler from using marijuana as a condition of his suspended sentence as long as he had a lawful prescription for it. RCW 9.94A.670(5)(a), (b), (d). Mr. Detwiler testified he had obtained a lawful prescription from a physician to use marijuana for the legitimate purpose of

relieving his chronic pain. 1/16/15RP 23; CP 56. Thus, because Mr. Detwiler did not violate a condition of the suspended sentence by using marijuana, the court was not authorized to revoke the SSOSA based upon that violation. RCW 9.94A.670(11); McCormick, 166 Wn.2d at 698.

Even if the court was not authorized to prohibit Mr. Detwiler from using marijuana in a lawful manner as a condition of the suspended sentence, that is not to say the treatment provider could not require Mr. Detwiler's abstinence as a reasonable condition of treatment. If Mr. Detwiler failed to make satisfactory progress in treatment, either due to his continued use of marijuana, or for any other reason, the court would have had authority to revoke the SSOSA at that point. RCW 9.94A.670(11)(b). In other words, the court was not without a means of ensuring that Mr. Detwiler's use of marijuana did not interfere with his progress in treatment or his ultimate rehabilitation. There is no showing that Mr. Detwiler's use of marijuana contributed to the offense or rendered him an immediate danger to the community. The statutory scheme required, therefore, that the court not act hastily in revoking the suspended sentence. The

court should have given Mr. Detwiler an opportunity to demonstrate whether he could actually succeed in treatment.

2. The sentencing conditions regarding the use of marijuana were contradictory and ambiguous and therefore unconstitutionally vague in violation of due process

The "void for vagueness" doctrine of the Due Process Clause requires that citizens have fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752; U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Const. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

Washington courts apply to sentencing conditions the same vagueness doctrine that applies to statutes and ordinances, with one exception. Bahl, 164 Wn.2d at 753. Unlike statutes and ordinances, sentencing conditions are not presumed valid. Id. A court abuses its discretion if it imposes a condition that is unconstitutionally vague. Id.

A sentencing condition is unconstitutionally vague if it (1) does not define the violation with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 752-53; Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855,

75 L. Ed. 2d 903 (1983). "[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." American Legion Post #149 v. Dept. of Health, 164 Wn.2d 570, 612, 192 P.3d 306 (2008) (quotation marks and citation omitted).

In deciding whether a sentencing condition is unconstitutionally vague, the terms are not considered in a vacuum but are considered in the context in which they are used. Bahl, 164 Wn.2d at 754.

Here, the sentencing conditions regarding the use of marijuana were ambiguous and contradictory and were therefore unconstitutionally vague. The conditions were "ambiguous" because they "admitt[ed] of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time." Webster's Third New International Dictionary 66 (1993).

Four of the conditions, set forth in three separate appendices attached to the judgment and sentence, specifically provided that Mr. Detwiler could use marijuana—or any other controlled substance—as long as he had a lawfully issued prescription. See CP 30 ("The offender shall not consume controlled substances except pursuant to

lawfully issued prescriptions."); CP 31 ("The defendant shall not consume controlled substances except pursuant to lawfully issued prescriptions."); CP 35 ("[n]ot consume controlled substances or alcohol, except pursuant to lawfully issued prescriptions"); CP 35 ("You shall not possess or consume any controlled substances without a valid prescription from a licensed physician").

Yet two other conditions provided apparently contradictory directives. One condition ordered Mr. Detwiler to comply with Mr. Comte's recommendations, which included that he "be prohibited from possessing and consuming alcohol and mind-altering substances, including marijuana." CP 32. In another condition, the court ordered, "Do not purchase, possess, or consume marijuana." CP 35. Neither of these conditions specified that marijuana use was prohibited even if Mr. Detwiler had a lawfully issued prescription.

As stated, each condition may not be considered in a vacuum but must be viewed in the larger context in which it was used. Bahl, 164 Wn.2d at 754. When the numerous separate conditions, found in disparate locations in the judgment and sentence, are considered in juxtaposition, it is apparent they either directly contradict each other or are at least ambiguous and confusing. It is not clear to a person of

ordinary intelligence whether marijuana use is prohibited under any circumstances, or only when obtained without a lawfully issued prescription. Because the conditions do not clearly state what conduct is proscribed, they are unconstitutionally vague. Id. at 752-53.

E. CONCLUSION

The court did not have statutory authority to prohibit Mr. Detwiler from using marijuana obtained with a lawful prescription as a condition of his suspended sentence. Therefore, the court acted without authority in revoking the suspended sentence based on a violation of that condition. In addition, the conditions regarding marijuana use were unconstitutionally vague. Thus, the order revoking the SSOSA must be vacated.

Respectfully submitted this 15th day of July, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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	)	
Respondent,	)	
	)	NO. 47169-8-II
v.	)	
	)	
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	)	
Appellant.	)	

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