

FILED

SEP 17 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

29100-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

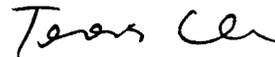
SAMUEL JOHNSON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

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Soap Lake, Washington 98851
(509) 237-1744

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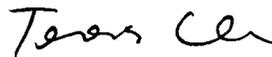
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction of the Appellant.

III. ISSUES

1. Was the Defendant informed of the direct consequences of his guilty plea including the domestic violence finding
 - where the DV finding is not the cause of the no-contact order,
 - where the DV finding is not the cause of limitations on earned early release,
 - where the Defendant was advised of the consequence of community custody,
 - where community custody explicitly permits the issuance of no-contact orders with the victim, and
 - where the issuance of a no-contact order is discretionary on the court and, therefore, not a direct, definite, immediate, or largely automatic consequence?

2. Is a statute that reminds judges to treat cases of domestic violence in the same way that they treat cases of violence between unrelated parties a penal statute that defines a criminal offense or prohibits conduct so as to be subject to the due process void for vagueness requirement?

IV. STATEMENT OF THE CASE

The Defendant Samuel Johnson was charged with residential burglary, harassment with domestic violence, and assault in the fourth degree with domestic violence on allegations that he forced his way into his brother's house, threatened to kill him, and assaulted him. CP 5-9.

At the Defendant's first appearance, the court released him on several conditions, including that he have no contact with his brother. RP 5-6.

The Defendant pled guilty to counts one and three: residential burglary and assault in the fourth degree with domestic violence. CP 10. The State agreed to dismiss count two and to recommend the low end of the standard range with the balance converted to work crew or partial confinement in order to accommodate the Defendant's work and child care. CP 13, 18.

The consequences of the guilty plea are delineated in section #6 of the

guilty plea statement over five pages. CP 11-16. The statement describes that “the judge may order me to serve up to one year of community custody” for crimes against person. CP 12. The Defendant admitted that he read the entire statement and understood it in full. CP 17. His signature is directly under the sentence indicating that he had no further questions. CP 17.

The Defendant’s sentence includes twelve months of community custody on count one. CP 28. Additional conditions of the sentence require the defendant to obey all laws, maintain full-time employment, not use illicit substances, submit to reasonable searches by the probation officer, not associate with others on probation, submit to polygraphs and urinalyses, not leave the county without permission, complete domestic violence counseling, and not contact the victim. CP 31-33. The Defendant signed the one-year protection order, which restrains him from “causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking” his brother. CP 34-35; RP 35. At the time this order was made, the Defendant expressed no objection or surprise. RP 35.

On appeal, the Defendant challenges this protection order and claims that this consequence was a possibility not known to him at the time of guilty plea.

V. ARGUMENT

A. THE DEFENDANT WAS INFORMED OF THE DIRECT CONSEQUENCES OF HIS GUILTY PLEA SO THAT HIS PLEA WAS VOLUNTARY AND DOES NOT WORK A MANIFEST INJUSTICE.

The Defendant complains that he was not informed of a direct consequence of his guilty plea, namely “that a no contact order would be imposed.” Appellant’s Opening Brief at 2. The Defendant alleges that the no-contact order is a result of the DV designation on his offense. He also alleges that the DV finding affects the maximum aggregate earned release time and could have resulted in electronic monitoring. Appellant’s Opening Brief at 3-4.

Standards for withdrawal of a plea: The courts will allow a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a *manifest injustice*. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010), *citing State v. Taylor*, 83 Wn.2d 594, 595, 521 P.2d 699 (1974) (quoting CrR 4.2(f)). A defendant must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea. *State v. A.N.J.*, 168 Wn.2d at 113-14, *citing State v. Barton*, 93 Wn. 2d 301, 305, 609 P.2d 1353 (1980). The distinction between a direct and collateral consequence “*turns on whether the result represents a definite, immediate and largely*

automatic effect on the range of the defendant's punishment." *State v. A.N.J.*, 168 Wn.2d at 114, citing *State v. Barton*, 93 Wn. 2d 301, 305, 609 P.2d 1353 (1980) (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973).

So, for example, in *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), the defendant was allowed to withdraw his guilty plea to correct a manifest injustice where the plea resulted in the mandatory imposition of community placement, where the record lacked evidence of any such advisement prior to the plea, and where the defendant claimed that he would not have agreed to the plea had he known of this consequence. There the court had no discretion on whether to impose community placement. *And* the defendant averred that this consequence would have affected his decision.

In the instant case, there is no manifest injustice to correct.

First, in the entire record including the Appellant's Opening Brief, the Defendant has never stated that he would not have pled guilty if he had known about the possibility of the imposition of a no-contact order.

He had already been under a pretrial release condition requiring that he not contact his brother. That this condition existed even *before* he was convicted of a crime and where a mere probable cause finding had been made should have made him aware that it was a condition that could remain in

place *after* he was found guilty beyond all reasonable doubt. He did not object to the pretrial release condition. RP 6, ll. 7-12. In fact, he informed the court that his brother had only recently moved to town from out of state and he did not know how his brother was employed. RP 3, ll. 8-11. He informed the court that he no reason, “none at all,” to have contact with his brother. RP 3, l. 23.

At his plea hearing, the Defendant indicated that he understood the plea form, which included an advisement that he could serve community custody and be subject to additional conditions. CP 12. He did not inquire into the myriad details of community custody. He indicated that he had no questions. CP 17. The court’s authority to regulate contact between the defendant and crime victim is explicit in the community custody statute. RCW 9.94A.703(3)(b).

At the sentencing hearing, the Defendant made no comment when he was asked to sign the protection order. RP 35.

In determining the timeliness of the notice of appeal, the Court considered the Defendant’s letters. Those handwritten letters asking to appeal suggest that the Defendant had changed his mind about his plea, not because he was unhappy with or had suddenly become aware of any consequences, but because he had come to the belief that he could prevail at

trial. Not in these letters or on any other record has the Defendant claimed that the issues raised on appeal affected his decision to plead guilty.

Without a record indicating that the Defendant would not have agreed to the guilty plea if he had been aware of the no-contact provision, there is no “manifest” concern.

Second, the Defendant has pointed to no *direct* consequence.

The Defendant suggests that the no-contact condition is causally related to the domestic violence finding attached to the assault offense. This is not true. In fact, under RCW 9.94A.703(3)(b), it is explicitly permitted as a condition of community custody for the burglary count – which has no domestic violence finding.

The Defendant claims that the no-contact condition was a direct consequence of the plea. But, under this law, the no-contact provision is “discretionary,” not “mandatory.” RCW 9.94A.703. While a judge is mandated to sentence a defendant to confinement within a range, a judge is not mandated to order a no-contact provision. Accordingly, it is not a “definite, immediate, and largely automatic effect on the range of the defendant’s punishment.” Consider that in crafting *the protection order*, the court only prohibited assaultive behavior, but did not order “no contact” with the victim or restrict contact with “a specified class of individuals” such as

the victim's immediate family. CP 34-35. This suggests that non-assaultive contact with the victim could result in a probation violation but not a new criminal offense of violating a protection order, and it further demonstrates the court's discretion.

The court also exercised discretion in limiting the duration of the protection order to one year. Under RCW 9.94A.703(3)(f), the court may order an offender to comply with any crime-related prohibition. A "crime-related prohibition" is an order prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). No contact with the victim is a crime-related prohibition. Courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940, *cert. denied* 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2008). *See also State v. Armendariz*, 160 Wn.2d 106, 118-20, 156 P.3d 201 (2007) (affirming five-year no-contact order with witness as a crime-related prohibition). Therefore, the court could have imposed the restriction for as long as ten years. RCW 9A.20.020(1)(b)(setting the statutory maximum sentence for a class B felony at ten years); RCW 9A.52.025(2)(defining residential burglary as a class B felony).

The Washington Supreme Court, which crafted the Statement Of

Defendant On Plea Of Guilty in CrR 4.2 with the input of prosecutors and defense attorneys across the state, included in the form every possible and known direct consequence. No-contact orders are a common and well-known sentencing provisions, yet there is no advisement of this possible consequence in the plea form. Instead, the plea form acknowledges the consequence of community custody and that community custody comes with “additional conditions.” CP 12. The form does not recite the many possible community custody conditions of RCW 9.94A.703 and RCW 9.94A.704, like refraining from alcohol, refraining from contacting the victim, submitting to searches or urinalyses, entering treatment, requiring full time employment, needing approval on one’s residence, constraining one’s travel, and complying with crime-related prohibitions. The plea form did not include any of the possible consequences demanded by the Defendant in this appeal (no-contact order, earned early release, elevated punishment).

The supreme court’s decision indicates two possible interpretations. First, that this advisement is sufficient to inform a defendant of the consequences of a guilty plea. After all, even RCW 9.94A.703 and RCW 9.94A.704 do not exhaust the possible conditions that may come with community custody. *See* RCW 9.94A.703 (permitting “any crime-related prohibitions”); RCW 9.94A.704(7)(a) and (9)(d) (permitting later notification

of “any additional conditions or modifications”). And, second, many of the conditions which the Defendant would have liked to have seen in the form are not direct consequences, but waivable or discretionary conditions. RCW 9.94A.703(2), (3).

The Defendant claims that the domestic violence finding resulted in a change in his possible aggregate earned early release time. Appellant’s Opening Brief at 3-4. This is incorrect. The maximum aggregate earned release may be affected by the offense of conviction, but not for the reason that a defendant was convicted of a *misdemeanor* with a finding of domestic violence. RCW 9.94A.729(3)(c)(ii). (The Defendant’s domestic violence finding is linked to the misdemeanor conviction of assault.) His earned early release is affected by his conviction for residential burglary, *not* the DV finding. RCW 9.94A.729(c)(ii)(E). Also, again, one’s earned early release is not an automatic or definite consequence of conviction. It must be earned.

The Defendant claims that the domestic violence finding “can” result in elevated punishments or “could” result in electronic monitoring. Appellant’s Opening Brief at 3-4. There are several problems with these claims.

First, the very language of the claims demonstrates that that the consequences are not “definite, immediate, and largely automatic.” They are

not direct consequences.

Second, contrary to the Defendant's claims, a domestic violence designation on a judgment and sentence does not increase penalties for other violations under RCW 10.99.040(4)(b). Referencing subsections (2) and (3), this statute states that if a defendant is subject to a no-contact order *while on pretrial release* in a case involving domestic violence, he or she shall receive a writing informing that a violation of this condition of release is a criminal offense 26.50 RCW. *See* RCW 26.50.110. This penalty results from conviction of another offense (therefore, not a direct consequence) and the existence of a pretrial release order, *not* a DV finding in a judgment and sentence.

And third, RCW 10.99.040(3) permits electronic monitoring in *pretrial release*. Again, this has nothing to do with a DV finding in a judgment and sentence. Consider, too, that electronic monitoring is a possible consequence of the community custody on the burglary count and regardless of any DV finding on the assault count. RCW 9.94A.704(8).

The Defendant points to *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000) as proof that a domestic violence finding can result in increased punishment. In fact, the case stands for the exact opposite. The court held that "the domestic violence designation [] did not alter the

consequences.” *State v. O.P.*, 103 Wn. App. 890. RCW 10.99 “signals the court that the law is to be *equitably* and vigorously enforced.” *State v. O.P.*, 103 Wn. App. at 892 (emphasis added). The legislature was not concerned that crimes of domestic violence should receive higher than average sentences, but that they were receiving lower than average sentences. The statute exists to emphasize that just because violence occurs in a family setting does not mean that it should not be taken equally seriously. *Roy v. City of Everett*, 118 Wn.2d 352, 358-59, 823 P.2d 1084 (1992) (“the purpose and intent of RCW 10.99 was to counteract the societal and historical tendency not to enforce laws against domestic violence”).

The case also states that the court will not consider what punishment “could have” resulted when “it did not have that effect here.” *State v. O.P.*, 103 Wn. App. at 892. The Defendant’s complaints about possible electronic monitoring or elevated sentences are entirely hypothetical and not the case before the court.

Because the Defendant’s actual sentencing consequences are not a direct result of the domestic violence finding or even a direct result of the guilty plea, the absence of any advisement on these accounts does not affect the voluntariness of the plea. Because the Defendant has never claimed that he would not have pled guilty if he had known that he could be subject to a

no-contact order, the guilty plea does not work a manifest injustice.

B. THE DOMESTIC VIOLENCE STATUTE DOES NOT ALTER THE ELEMENTS OF THE OFFENSE AND, THEREFORE, IS NOT SUBJECT TO A VAGUENESS CHALLENGE.

The Defendant claims that the domestic violence statute is void for vagueness because it “does not specify the degree of blood or family relationship.” Appellant’s Opening Brief at 4-5.

The due process vagueness doctrine regards the definiteness with which a penal statute defines a criminal offense. *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990); *A.W.R. Const., Inc., Washington State Dept. of Labor & Industry*, 152 Wn. App. 479, 489, 217 P.3d 349 (2009), citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Ordinary people should have fair notice of what conduct is prohibited.

A vagueness analysis encompasses two due process concerns. First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *City of Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. See *United States v. Wivell*, 893 F.2d 156, 159 (8th Cir.1990).

State v. Baldwin, 150 Wn.2d at 458. See also *State v. Halstien*, 122 Wn.2d

109, 117, 857 P.2d 270 (1993); *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

But the Domestic Violence Act does not criminalize any conduct. Therefore, it is not subject to a vagueness challenge.

Generally, the void for vagueness doctrine does not apply to a sentencing scheme. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). The void for vagueness doctrine applies to laws that involve conduct, not sentencing directives.

State v. Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008). It is theoretically and analytically unsound to apply the doctrine to laws other than those which proscribe or prescribe conduct. *State v. Jacobson*, 92 Wn. App. 958, 966, 965 P.2d 1140 (1998), *review denied* 137 Wn.2d 1033, 980 P.2d 1282 (1999), *citing United States v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990). *See also State v. Baldwin*, 150 Wn.2d at 458 (agreeing with the contention in *Jacobson*).

The Domestic Violence Act “created no new crimes but rather emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor.” *Roy v. City of Everett*, 118 Wn.2d 352, 358, 823 P.2d 1084 (1992). Domestic violence is not a separate crime with elements that the State must prove. *State v. Goodman*, 108 Wn. App. 355,

359, 30 P.3d 516, *review denied* 145 Wn.2d 1036, 43 P.3d 20 (2001). Identifying a crime as a domestic violence crime does not itself alter the elements of the offense, but only signals the court that the law is to be equitably and vigorously enforced. *State v. Goodman*, 108 Wn. App. at 359, *citing State v. O.P.*, 103 Wn. App. at 892.

In *State v. O.P.*, 103 Wn. App. at 891, the defendant complained that he was convicted of an uncharged offense where he was charged with assault in the fourth degree but convicted of assault in the fourth degree with a finding of domestic violence. The court affirmed the conviction, concluding that the domestic violence designation did not alter the essential elements or consequences of the charge of fourth degree assault. *State v. O.P.*, 103 Wn. App. at 890.

The Washington Supreme Court has held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause, because they “do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State.” *State v. Baldwin*, 150 Wn.2d at 459. “A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties.” *Id.*

For the same reason, the domestic violence finding is not subject to a vagueness challenge. The Domestic Violence Act does not proscribe or prescribe conduct; it does not alter the essential elements or consequences of an offense; it does not result in additional penalties or consequences. The Act requests that judges view a crime of domestic violence in the *same* way that they view crimes between strangers, as equally deserving of the court's attention and concern.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 16, 2010.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

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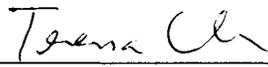
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29100-6-III
)	
v.)	DECLARATION OF MAILING
)	
SAMUEL L. JOHNSON,)	
)	
Appellant.)	
)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the Appellant (Samuel L. Johnson, Booking #2010-00775 WW County Corrections Facility, 300 West Alder, Walla Walla, WA 99362) and to the attorney of record (Kristina M. Nichols, Attorney at Law, PO Box 19203, Spokane, WA 99219-9203) for the Appellant containing a Respondent's Brief in the above entitled matter.

DATED: September 16, 2010.



 Teresa Chen

DECLARATION OF MAILING