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JUL 06 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29362-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

OSCAR ALVEREZ DEL CASTILLO,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in imposing a condition of community custody that Mr. Del Castillo obtain an alcohol abuse evaluation within 60 days of release and successfully complete any recommended treatment/counseling program as part of the sentence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the sentencing court exceed its statutory authority by imposing a condition of community custody that was not crime-related? Did the court's delegation to a community corrections officer the authority to determine without a hearing whether a treatment counseling program is necessary and crime-related, violate due process and constitute an excessive delegation of judicial authority?

C. STATEMENT OF THE CASE

Mr. Del Castillo was convicted, following a trial to stipulated facts, of possession of methamphetamine with intent to deliver while armed with a firearm, and alien in possession of a firearm. CP 138-41. He received a standard range sentence. CP 142-53. As part of the sentence, the court imposed the following condition of community custody:

The defendant shall obtain an alcohol/substance abuse evaluation within 60 days of release and shall successfully complete any recommended treatment/counseling program.

CP 151.

This appeal followed. CP 41-58.

B. ARGUMENT

The sentencing court violated due process and exceeded its statutory authority by imposing a condition of community custody that was not crime-related, and delegating to a community corrections officer the authority to determine without a hearing whether a treatment counseling program is necessary and crime-related.

Herein, as a condition of sentence, the court imposed the following condition:

The defendant shall obtain an alcohol/substance abuse evaluation within 60 days of release and shall successfully complete any recommended treatment/counseling program.

CP 151.

This condition is unrelated to the crime for which Mr. Del Castillo was convicted. The condition further violated due process and is an improper delegation of the court's authority.

A trial court's sentencing authority is limited to that granted by statute. *State v. Moen*, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing *State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024 (1993)). If a trial court exceeds that authority, its order may be

corrected at any time. *Paine*, 69 Wn. App. at 883. In some instances, conditions of community custody not directly related to the circumstances of the crime are not authorized by statute. A trial court lacks authority to impose such conditions. See *State v. Bird*, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d (1980). Sentencing conditions are reviewed for abuse of discretion. See *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Community custody conditions for the offense at issue here are governed by RCW 9.94A.703, which provides in pertinent part:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. . . .

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to: . . .

(c) Participate in crime-related treatment or counseling services.

RCW 9.94A.703(3)(c).

Mr. Del Castillo challenges the condition imposed that he attend and participate in an inpatient or outpatient alcohol program, if ordered to do so by the supervising Community Corrections Officer. RCW 9.94A.703(3)(c) states that such treatment programs must be crime related.

See also RCW 9.94A.030(10); RCW 9.94A.505(8). Here, there was no evidence that alcohol was involved in the commission of the crime. The affidavit of probable cause, the police report, and the stipulated facts, on which the court relied in finding Mr. Del Castillo guilty, make no mention of alcohol. See CP 74-75, 122-34, 135-37, respectively. Therefore, this condition is unrelated to the crimes of which Mr. Del Castillo was convicted, and must be stricken on that basis.

Improper delegation. Further, the Court's delegation of authority to DOC to determine what is "crime-related" is not authorized by statute. The imposition of crime-related prohibitions must be made by the Court, not DOC. See RCW 9.94A.030(10)¹. Sentencing courts do have the power to delegate some aspects of community placement to probation. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).² However, sentencing courts may not delegate excessively. *Id.* at 642. A sentencing court "may not wholly 'abdicate [] its judicial responsibility'

¹ " 'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department." RCW 9.94A.030(10).

² While it is the function of the judiciary to determine guilt and impose sentences, "the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in nature and are properly exercised by an administrative body, according to the manner prescribed by the

for setting the conditions of release.” *Sansone*, 127 Wn. App. at 643, quoting *United States v. Loy*, 237 F.3d 251, 266 (3rd Cir. 2001) (quoting *United States v. Mohammad*, 53 F.3d 1526, 1538 (7th Cir. 1995)).

The precise delineation of the terms of probation is a core judicial function. *State v. Williams*, 97 Wn. App. 257, 264, 983 P.2d 687 (1999). The task cannot be delegated to a probation officer, treatment provider, or other agency. *Williams*, 97 Wn. App. at 264. The Court’s analysis in *Williams* is instructive.

Williams pled guilty to a number of misdemeanors. The district court sentenced him to probation. The sentencing order stated: “The Probation Department is responsible for setting specific conditions of probation. The Defendant may request a hearing to review these conditions.” *Williams*, 97 Wn. App. at 260.

Upon entering probation, Williams received a form that ordered him not to use alcohol or unlawful drugs, and to submit to alcohol and drug testing upon request. These conditions had not been mentioned in the original sentencing order, and Williams’ use of alcohol or drugs did not play a role in the crimes to which he pled guilty. When Williams subsequently violated the alcohol and drug conditions, the probation

Legislature.” *Sansone*, 127 Wn. App. at 642 (quoting *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937)).

department recommended an alcohol evaluation. The probation officer obtained the court's approval for the new conditions informally, without a hearing, by having the commissioner initial the phrase "OK" on a form. *Williams*, 97 Wn. App. at 261. Williams did not adhere to the new conditions, either, and eventually the court revoked his probation. *Id.*

On appeal, Williams argued the drug and alcohol conditions were imposed without a hearing and therefore violated his due process rights. Because Williams was informed he had a right to a hearing to review the conditions, however, due process was satisfied.

The original sentencing order advised Williams of his right to a hearing to review the specific conditions of probation that were to be set by the Probation Department. The agreement he signed in July, 1996, also notified him of his right to request a hearing at any time to review its terms. Williams does not contend that the order to undergo alcohol treatment was unclear. He could have objected to the alcohol-related conditions at any one of the several hearings the commissioner held before imposing jail time as a sanction for probation violations. Williams received notice and an opportunity for a hearing sufficient to satisfy due process.

Williams, 97 Wn. App. at 264 (citation omitted).

Williams also argued that allowing the Probation Department to establish the specific conditions of his probation was an unlawful delegation of judicial authority. *Williams*, 97 Wn. App. at 264. The Court agreed that setting the terms of probation is a "core judicial function." *Id.* Nevertheless, the Court concluded that so long as the sentencing court

“ratifies the terms recommended by the probation officer or treatment agency and adopts them as its own,” there is not unlawful delegation as a matter of fact. *Williams*, 97 Wn. App. at 265. Accordingly, the Court concluded that the district court had not unlawfully delegated its authority, although the Court did not necessarily condone the informal procedure used to ratify the probation conditions. *Id.*; see also *State v. Wilkerson*, 107 Wn. App. 748, 755, 31 P.3d 1194 (2001).

The application of rehabilitative programs ordered by a court is an administrative function properly exercised by an administrative body. *Sansone*, 127 Wn. App. at 642. The problem with the condition challenged herein is that it allows the community corrections officer [hereafter “CCO”] not only to oversee the application of any treatment counseling programs ordered by the court, but to pick them as well. This is a core judicial function that cannot be delegated. And unlike in *Williams*, there is no indication herein of a procedure in place whereby the court ratifies and adopts as its own the condition imposed by the CCO.

Furthermore, Mr. Del Castillo has not been given the right, as in *Williams*, to contest CCO-imposed conditions at a hearing. Accordingly, the condition violates due process as well. Although Mr. Del Castillo has not been charged with violating the condition, he should not have to wait

until that potentiality to challenge it. See, e.g., *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (where a sentence in insufficiently specific about the period of community placement or community custody, remand for amendment of the judgment and sentence to expressly provide for the correct period is the proper course).

For all the above reasons, this Court should strike the offending condition.

D. CONCLUSION

For the reasons stated, the unauthorized community custody condition should be stricken.

Respectfully submitted July 5, 2011.



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vs.)	
)	
OSCAR ALVEREZ DEL CASTILLO,)	PROOF OF SERVICE
)	(RAP 18.5(b))
Appellant.)	

I, David N. Gasch, do hereby certify under penalty of perjury that on July 5, 2011,
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