

FILED

JUN 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

29418-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIZABETH J. HILLING,

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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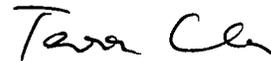
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RCW 9.94A.703 1, 2, 3, 4

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 sentence of the Appellant.

III. ISSUES

Did the sentencing court abuse its discretion in ordering as a condition of community custody that the defendant be employed or in school as required by RCW 9.94A.703(2)(b)?

IV. STATEMENT OF THE CASE

The Defendant Elizabeth Hilling was originally charged with possession with intent to deliver marijuana, possession of methamphetamine, and use of drug paraphernalia. CP 1-3. She pled guilty to felony possession of marijuana. CP 4-14.

As a condition of her community custody, the judge ordered that she “maintain full-time employment or education or a combination thereof throughout the duration of [her] probation.” CP 23; RP 35. The Defendant did not object. RP 35-37.

V. ARGUMENT

THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN ORDERING EMPLOYMENT/EDUCATION AS A CONDITION OF COMMUNITY CUSTODY.

The Defendant challenges the condition of employment/education – for the first time on appeal. The appellate court may refuse to review such a claim under RAP 2.5(a).

The parties are in agreement as to the standard of review. Brief of Appellant at 5. Sentencing conditions are reviewed for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

A sentencing court sets mandatory, waivable, discretionary, and special conditions of community custody under the authority in RCW 9.94A.703.¹ The Defendant frames the condition of employment/education as a “crime-related prohibition.” Brief of Appellant at 5. A sentencing court has the discretion to order that a defendant “[c]omply with any crime-related prohibitions” as a condition of community of custody. RCW 9.94A.703(3)(f).

The authority comes from an earlier paragraph regarding “waivable

¹ Several of the SRA sections cited by the Appellant have been recodified or repealed, effective 2009. The offense date here is June 14, 2010. CP 4, 12. And the sentencing date is September 7, 2010. CP 14, 22.

conditions” which states that “[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to [...]work at department-approved education, employment, or community restitution, or any combination thereof.” RCW 9.94A.703(2)(b)². Because the court did not specifically waive the condition, the court was required by law to impose it.

The Defendant argues that “the condition must relate to the circumstances of the crime.” Brief of Appellant at 7. A plain reading of the statute demonstrates otherwise.

The Defendant argues that several cases support his interpretation. All three cases he cites regard the “discretionary” condition of “crime-related prohibitions” under subsection (3) as opposed to “waivable conditions” under subsection (2).

In *State v. Parramore*, 53 Wn. App. 527, 768 P.2d 530 (1989), the defendant was required as a condition of his community supervision to submit to urinalysis after his drug conviction. The court considered this a “crime-related prohibition” and noted that the urinalysis was related to the offense. This case is not on point. The particular condition Parramore

² This section is included in the Brief of the Appellant at 6, citing former RCW 9.94A.700(4).

challenged does not fall under RCW 9.94A.703(2). It was properly analyzed as a crime-related prohibition under subsection (3).

In *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) and in *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006), the condition challenged was a prohibition against association with drug offenders. That condition again does not fall under subsection (2) and can be analyzed as a crime-related prohibition under subsection (3).

It is interesting to note that in *State v. Llamas-Villa*, the court held that, while the prohibition against association with drug users was actually related to the offense of possessing cocaine with intent to deliver, “there is no statutory requirement that a special community placement condition imposed under RCW 9.94A.120(8)(c) be crime-related.” *State v. Llamas-Villa*, 67 Wn. App. at 456. Similarly, there is no statutory requirement that the waivable conditions under RCW 9.94A.703(2) be crime-related.

Finally, the Defendant argues that the condition of employment is “unreasonable” in the current economic climate, “since it is highly unlikely that Ms. Hilling will be able to obtain or maintain full-time employment.” Brief of Appellant at 8. The Defendant also argues that she may not “qualify” for education or may not be able to afford schooling. Brief of Appellant at 9.

This latter argument is not persuasive. There are federal educational grants available for people of every circumstance.

In *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), the United States Supreme Court held that a defendant could not be incarcerated for failure to pay a fine, unless the failure is willful. The court emphasized that a person should not be imprisoned solely due to poverty.

This is essentially the Defendant's argument: that she should not be found to have violated the condition if her failure to find full-time work or schooling is not willful.

First, however, her complaint is premature. *Bearden's* case came before the court after he had been found to have violated the condition. In the instant case, the State is not even alleging a violation of the condition. In *State v. Llamas-Villa*, the defendant claimed the prohibition against association with drug users was "not narrowly drawn," because there was no requirement that he "know" that the people were drug users. *State v. Llamas-Villa*, 67 Wn. App. at 455. The court responded "[i]f Llamas is arrested for violation of the condition, he will have an opportunity to assert that he was not aware that the individuals were using, possession, or dealing drugs." *State v. Llamas-Villa*, 67 Wn. App. at 456. This suggests that the proper time

to raise the argument is at a violation hearing where intent can be raised as a defense.

Second, when and if the Defendant should be accused of violating this condition, her counsel on appeal has a strong argument already in hand that her mere poverty cannot be the reason for her incarceration. *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064.

In *Bearden*, the Supreme Court noted that the *reason* for noncompliance “is of critical importance here.” *Bearden v. Georgia*, 461 U.S. at 668, 103 S.Ct. at 2070. A court “must inquire into the reasons for the failure” and “should consider the defendant’s “entire background [...] including his employment history and financial resources.” *Bearden v. Georgia*, 461 U.S. at 670, 672, 103 S.Ct. at 2071, 2073. Incarceration may be appropriate for a willful failure to comply or a failure to make bonafide efforts to comply. *Bearden v. Georgia*, 461 U.S. at 672, 103 S.Ct. at 2073. But if the failure to comply is in spite of the defendant’s honest efforts, the court may consider alternative punishments short of incarceration which balance the state’s interest in punishment and deterrence.

VI. CONCLUSION

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

DATED: June 16, 2011.

Respectfully submitted:



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