

FILED

FEB 14, 2012

Court of Appeals
Division III
State of Washington

NO. 30050-1-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

CARL JAMES PRICE,

APPELLANT.

RESPONDENT'S BRIEF

D. ANGUS LEE
PROSECUTING ATTORNEY
Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and the extension of the Appellant's condition that he have no unsupervised contact with minors must be affirmed.

III. ISSUES

1. Whether the extension of a condition of supervision under RCW 9.94A.709 violates double jeopardy and *ex post facto* protections.
2. Whether the extension of a condition of supervision under RCW 9.94A.709 violated due process.

IV. STATEMENT OF THE CASE

The appellant, Carl Price, pled guilty to one count of Child Molestation in the First Degree on October 18, 2004 and was sentenced on December 20, 2004. CP 16-30. Although the sentence was governed by

RCW 9.94A.712 which would have subjected Mr. Price to the potential of lifetime community custody, the court erroneously ordered only 68 months. CP 21. *N.B.*, Mr. Price's plea of guilty included language which stated that "(i)n addition to the period of confinement, I will be sentenced to community custody for any period of time I am released from total confinement before the expiration of the maximum sentence. During the time of community custody I will be under the supervision of the Department of Corrections and I will have restrictions placed on my activities and I may be required to participate in rehabilitative programs." 05/27/11 RP 26. Additionally the sentencing court had indicated in the judgment and sentence by checking off a check mark that Mr. Price's sentence was subject to sentencing under RCW 9.94A.712.

05/27/11 RP 7.

On May 27, 2011, at the request of the Department of Corrections (DOC), this matter was heard for a motion to extend Mr. Price's community custody requirements. At the onset of the hearing, the State conceded that based upon *In re Pers. Restraint of Murillo*, 134 Wn.App. 521, 142 P.3d 615 (2006), the State did not believe that Mr. Price's community custody could be extended under RCW 9.94A.712, but did

have a good faith belief that the terms of Mr. Price's community custody could be extended under RCW 9.94A.709. 05/27/11 RP 3, 4.

DOC had determined that the Mr. Price's 68 month period of supervision would expire on May 31, 2011. 05/27/11 RP 8. DOC requested that three conditions of Mr. Price's supervision be extended: 1) that Mr. Price not possess or use any pornography; 2) that Mr. Price not have any contact with children under the age of 18, except in the company of a responsible adult; and 3) that Mr. Price not consume any alcohol. 05/27/11.

At the conclusion of the parties' arguments, the court granted only DOC's request that Mr. Price have no contact with minors except in the company of a responsible adult. 05/27/11.

V. ARGUMENT

A. THE EXTENSION OF A CONDITION OF APPELLANT'S COMMUNITY CUSTODY NEITHER VIOLATED DOUBLE JEOPARDY NOR *EX POST FACTO* PROHIBITIONS.

Double jeopardy does not result just because the appellant is subsequently prosecuted for the offense constituting the violation. *State v. Prado*, 86 Wn.App. 573, 577, 937 P.2d 636 (1997) *review denied*, Wn.2d

(Wash. No. 65646-1) (Nov. 5, 1997) ; *State v. Dupard*, 93 Wn.2d 268, 276, 609 P.2d 961 (1980); *United States v. Soto-Olivas*, 44 F.3d 788 (9th Cir.) *cert. denied*, 515 U.S. 1127 (1995). Furthermore, Mr. Price simply fails in his double jeopardy argument as he cannot show how he has previously been put into jeopardy for a violation which at this time is only speculative.

The *ex post facto* clauses of the state and federal constitutions prohibit the state from enacting any law which imposes punishment for an act which was not punishable when committed or which increases the quantum of punishment for the offense after the crime was committed. U.S. Const. Art. I, sections 10, 23. A law violates the *ex post facto* clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective by applying to events which occurred before its enactment; and (3) disadvantages the person affected by it. The sole determination of whether a law is disadvantageous is whether the law alters the standard of punishment which existed under prior law. *State v. Hennings*, 129 Wn.2d 512, 525, 919 P.2d 580 (1996), *In re Pers. Restraint of Marler*, 108 Wn.App. 799, 33 P.3d 743 (2001).

RCW 9.94A.709 was enacted in 2008 as part of “(a)n act relating to ensuring that offenders receive accurate sentences.” It reads in its entirety:

9.94A.709. Community custody – Sex offenders – Conditions

- (1) At any time prior to the completion or termination of a sex offender’s term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions of community custody for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender’s term of community custody.
- (2) If a violation of a condition extended under this section occurs after the expiration of the offender’s term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040.
- (3) If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender’s compliance with the condition.

RCW 7.21.040 is a criminal statute which provides for the filing of criminal contempt charges which could subject the offender to up to a year in jail and/or \$5,000 in fines.

Because RCW 7.21.040 is a criminal statute, it does not fall automatically that any alleged future violation by Mr. Price would lead to either imprisonment or fines. Any allegation of a future violation would need to be proven by the higher standard of evidence beyond a reasonable doubt. In this manner it differs from a violation of community custody which need only be proven by the lower standard of preponderance of the evidence.

The prohibition that Mr. Price have no unsupervised contact with child is not a new condition but is rather an extension of a pre-existing condition . And it was also the only condition of those requested by DOC which the court felt had a direct correlation in the prevention of any future crimes against children by the appellant. 05/27/11 RP 30. In contrast, the court articulated that the other two requested extensions of conditions by DOC would not necessarily enhance public safety. 05/27/11 RP 29, 30.

Mr. Price cannot show that he has previously been punished for an offense that is now, only speculative, nor can he show that extension of his community custody condition is substantive rather than procedural.

Finally as he can show no right, reliance, or expectation in having contact with minors, he can show no disadvantage.

B. AS THE APPELLANT CAN SHOW NO VESTED RIGHT IN BEING ALLOWED CONTACT WITH MINORS, HE CAN SHOW NO VIOLATION OF HIS DUE PROCESS RIGHTS IN AN EXTENSION OF THAT PROHIBITION.

Statutes are presumed constitutional. *Hennings* at 587 citing *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). A party challenging the constitutionality of a statute bears the burden of proving it unconstitutional beyond a reasonable doubt. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). A retroactive law violates due process if it deprives an individual of a vested right. The court has held that the “proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectation of the parties.” *In re Santore*, 28 Wn.App. 319, 324, 623 P.2d 702 *review denied*, 95 Wn.2d 1019 (1981).

Mr. Price can show no vested right in contact with children under the age of 18, nor can he show that he changed his position in reliance upon his previous expectation of a cessation of that prohibition. As such, he cannot show that his due process rights have been violated.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that appellant's request to be relieved of the lifetime prohibition that he have no contact with minors be denied.

DATED this 13th day of February, 2012.

Respectfully submitted:

D. Angus Lee, WSBA #36473
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Carole L. Highland
Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

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CARL J. PRICE,)	DECLARATION OF MAILING
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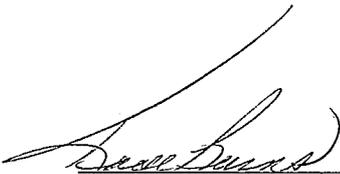
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Douglas D. Phelps, attorney for Appellant, and to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

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Mr. Carl James Price
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Dated: February 14, 2012.



Kaye Burns

Declaration of Mailing.