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Jan 31, 2012
Court of Appeals
Division III
State of Washington

COURT OF APPEALS NO. 30262-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARY CLUCK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable Donald W. Schacht, Judge,

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court acted outside its authority when it required appellant to "[o]bey all laws" as part of her community placement conditions.

Issue Pertaining to Assignment of Error

As part of the judgment and sentence, the court ordered that appellant comply with numerous conditions during her community placement term. One of those conditions specifically stated that appellant shall "[o]bey all laws." Did the court exceed its authority by requiring appellant to remain crime-free during her term of community placement?

B. STATEMENT OF THE CASE

Appellant Mary Cluck is appealing from the judgment and sentence entered following her resentencing, which was granted on the state's motion to clarify the period of community placement imposed as part of her original judgment and sentence in 1997. CP 25.

On August 1, 1995, the Walla Walla County prosecutor charged Cluck with three counts of first degree assault, for allegedly shooting at Mable Searles, Donna Alessio and Karen Dempsey on July 30, 1995. CP 1-3; RCW 9A.36.011(1)(a). Cluck

pled guilty to counts 1 and 2, pursuant to a plea agreement, on August 19, 1996. CP 26-33. As part of the plea agreement, Cluck was informed that in addition to confinement, "the judge will sentence me to community placement for at least 1 year." Id.

On February 18, 1997, the parties stipulated that Cluck should be allowed to withdraw her guilty plea entered on August 19, 1996, "for the reason that the parties were mistaken as to the standard range sentence and withdrawal of the plea is necessary to correct a manifest injustice." CP 41-42.

Cluck thereafter entered guilty pleas to counts 1 and 3. CP 34-40. As part of her prior plea, Cluck was informed her standard range "for the crime" was 111 months to 147 months of confinement. CP 26-33. This time, she was informed that for each count, the standard range was 93 to 123 months of confinement. CP 34-40. Cluck was also informed these sentences would run consecutively. Id.

As before, Cluck was informed that "In addition to confinement, the judge will sentence me to community placement for at least 1 year."

Id.

At sentencing on March 12, 1997, the court imposed 110 months on count 1 and a consecutive sentence of 110 months on count 3 for a total of 220 months of confinement. CP 7. The court also sentenced Cluck to "community placement or community custody for the period of time provided by law." CP 7. One of the conditions of community placement was that Cluck "obey all laws." CP 8.

On August 17, 2011, the state filed a motion to correct the term of community placement to provide for a definite term of 24 months. CP 43-45. As the state noted, "A court has the authority to correct an erroneous sentence." Id. (citing State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996)). As the state also noted, first degree assault is classified as a serious violent offense. Former RCW 9.94A.030(29)(a) (1995); RCW 9.94A.030(45)(v). At the time of Cluck's offense, former 9.94A.120(8)(b) provided for a two year period of community

placement for serious violent offenses. See also RCW 9.94A.700(2)(b).

The court thereafter entered an order correcting the term of community placement to reflect that it was ordered for 24 months or the period of earned early release, whichever is longer. CP 16. Again, the court ordered that "Defendant shall obey all laws." CP 17. Cluck timely filed a notice of appeal. CP 25.

C. ARGUMENT

THE COURT HAD NO AUTHORITY TO ORDER THAT CLUCK "OBEY ALL LAWS" AS A CONDITION OF COMMUNITY PLACEMENT.

As the state noted in its motion to correct the judgment and sentence, this Court has both the power and the duty to correct an erroneous sentence when it is discovered. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). It is also well established that a criminal defendant may challenge an illegal or erroneous sentence for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

Because Cluck was convicted of a serious violent offense crime committed after July 1, 1990, she was subject to community placement for two years or the period of earned early release, whichever is longer. Former RCW 9.94A.120(8)(a) (1995).

"Community placement" means "that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release." Former RCW 9.94A.030(5) (1995).

The authorized community custody conditions are identified in former RCW 9.94A.120. For those offenders who committed their crimes after July 1, 2000, the Legislature specifically stated that defendants may be required to "obey all laws." There is no similar authority for crimes committed before that date. *State v. Jones*, 118 Wn. App. 199, 205, 76 P.3d 258 (2003).

The court was instead authorized to order compliance with "crime- related prohibitions." Former RCW 9.94A.120(8)(c). But that does not permit courts to require that defendants refrain from new criminal conduct. See *State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, rev. denied, 133 Wn.2d 1018 (1997); *State v. Raines*, 83 Wn. App. 312, 316, 922 P.2d 100 (1996); *State v. Barclay*, 51 Wn. App. 404, 406-08, 753 P.2d 1015, rev. denied, 111 Wn.2d 1010 (1988).

This Court therefore should strike the condition that Cluck "obey all laws."

D. CONCLUSION

Appellant requests that this Court strike the "obey all laws" condition of community placement.

Dated this 31st day of January, 2012

Respectfully submitted

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State v. Mary Cluck

No. 30262-8-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 31st day of January, 2012, I caused a true and correct copy of the **opening brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Teresa chen
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Signed in Seattle, Washington this 31st day of January, 2012.

X Patrick Mayovsky

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	COA NO. 30262-8-III
vs.)	
)	
MARY CLUCK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARY CLUCK
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY 2012.

x Patrick Mayovsky