

FILED
Apr 23, 2012
Court of Appeals
Division III
State of Washington

No. 30310-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRUCE L. AUSTIN,

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. Austin not purchase or possess alcohol.

Issue Pertaining to Assignments of Error

Did the sentencing court violate due process and exceed its statutory authority by imposing a condition of community custody that Mr. Austin not purchase or possess alcohol?

B. STATEMENT OF THE CASE

Bruce Austin was charged and convicted by the Court of two counts of possession of depictions of a minor engaged in sexually explicit conduct. CP 4-5, 30-33. As part of his sentence, the court imposed the following conditions of community custody:

Abstain from purchasing, possessing or consuming alcohol.

CP 38.

This appeal followed. CP 53-54.

C. ARGUMENT

The sentencing court violated due process and exceeded its statutory authority by imposing a condition of community custody that Mr. Austin not purchase or possess alcohol.

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: . . .

(e) Refrain from *consuming* alcohol; or

(f) Comply with any crime-related prohibitions . . .

RCW 9.94A.703(3)(e) and (f) (emphasis added).

Here, the sentencing court imposed the condition that Mr. Austin not *purchase* or *possess* alcohol. CP 38. RCW 9.94A.703 (3)(e) allows the trial court to prohibit only the consumption of alcohol, not its possession. The trial court had the authority to prohibit Mr. Austin from consuming alcohol regardless of whether alcohol was related to the crime. *Id.* See also *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (holding that a trial court can order that a defendant sentenced to community custody not consume alcohol despite the lack of evidence that alcohol had contributed to his offense). However, in order to prohibit Mr. Austin from *purchasing* or *possessing* alcohol, alcohol would somehow have had to contribute to his offense. There was no evidence that alcohol played a role in these crimes of possession of depictions of a minor engaged in sexually explicit conduct. Therefore, the trial court could not go beyond the statutory authority of RCW 9.94A.703(3)(e), which allows only the prohibition of the consumption of alcohol. The requirement that

Mr. Austin not purchase or possess alcohol was improperly imposed and should be stricken.

D. CONCLUSION

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

Respectfully submitted April 23, 2012,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 23, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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