

COA No. 33551-8-III

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APR 12, 2016  
Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LUIS HERNANDEZ-RIVERA,

Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

1. The court abused its discretion by ordering community custody in light of its consideration of matters in violation of the real facts doctrine and Luis Hernandez-Rivera's extradition to Nevada.

### *Issue Pertaining to Assignment of Error*

A. Did the court abuse its discretion by ordering community custody in light of its consideration of matters in violation of the real facts doctrine and Mr. Hernandez-Rivera's extradition to Nevada? (Assignment of Error 1).

## II. STATEMENT OF THE CASE

Mr. Hernandez-Rivera was charged by information with one count of possession of a controlled substance, Vicodin. (CP 4). Pursuant to negotiations, he decided to plead guilty to the charge. (CP 9).

The statement of defendant on plea of guilty indicated the State would ask for 12 months community custody, but the defense did not agree as Mr. Hernandez-Rivera was waiving extradition to face a charge in Nevada. (CP 9). The standard range for the charge was 0-6 months. (*Id.*). The guilty plea statement further reflected that "[i]n addition to sentencing me to confinement under certain circumstances the judge may order me to serve up to one

year of community custody if the total period of confinement ordered is not more than 12 months, but only if the crime I have been convicted of falls into one of the offense types listed in the following chart.” (CP 11). The possession of a controlled substance charge fell into one of the offense types listed. (*Id.*).

At the guilty plea and sentencing hearing, the State argued community custody was appropriate. (6/18/15 RP 7-8). After the court read Mr. Hernandez-Rivera’s statement regarding the circumstances of the offense, the State added:

According to Detective Fairchild of the Lead Task Force, the 13<sup>th</sup> day of May, 2015 about 7:30 in the evening, a Sunnyside police officer made a traffic stop on a Pedro Almaguer out of Outlook who he knew was suspended. The officer observed the driver and this passenger leaning towards each other at the center console and reaching towards the floor with their arms as if they were going to conceal something. Officer Barry also smelled marijuana and commented on it. The driver said that he had his bud pipe which was next to him and he was taken into custody for that. . . . When this defendant stepped out of the vehicle a .9 millimeter bullet and a device for quickly and painlessly getting bullets into a magazine for a semi-automatic weapon fell to the ground and a baggy containing pills fell to the front passenger floorboard and I’m not sure if that’s what Mr. Hernandez-Rivera is now claiming had the crushed Vicodin. The defendant advised that those pills were him – those pills were Vicodin but that they were not his and he was detained at that time. And I

bring that up with a couple of other factors that are going to contribute to the State's argument for community custody.

Officers couldn't get the car running again, so they had to impound it and when they – they ended up trying to jump it and got the hood open in order to be able to try and get this car moving. When they dropped the hood, the force dislodged a semi-automatic pistol from underneath the steering column where it had been tucked up underneath. The driver claims that that gun was handed to him to by this defendant. Now, I can't prove that and I'm really in a catch 22 situation. The driver is charged, so if I put the driver on the stand to say that this defendant gave him the gun, then I've violated that driver's Fifth Amendment right to stay silent and if I don't, I've violated this defendant's Sixth Amendment right to confront the witnesses against him. So I really am in a bind as to that, but it's one of those things that just the fact that the gun is there is something that the Court needs to know about even though I can't prove that it's this defendant's.

As well, Judge, in the center console there was a bunch of gang related paraphernalia and writing and at the least the driver is a known gang associate giving us an inference that this defendant is also gang-affiliated. Again, prove it, no, but it sort of passes the duck test. It smells like a duck, quacks like a duck. Those are the general facts, though, not just that there was some crushed Vicodin and some trash at the floorboard. (6/18/15 RP 5-7).

But the defense had noted that in the plea agreement, Mr.

Hernandez-Rivera agreed only that he knew Vicodin was in the car:

I will tell you nothing with regards to the gun is agreed but if you're just referring to the Vicodin, my client knew that it was in the car, and he knew that it was Vicodin. (6/18/15 RP 7).

The State further argued on the sentence and community custody:

Judge, the credit for time served is agreed. Mr. Hernandez-Rivera is going to be extradited back to Carson City, Nevada, for their equivalent of a burg 1 with a firearm. It's got a different title, but near as I can tell it's the unlawful entry into a residence with the intent to commit a crime while armed with a firearm. Same – same basic concept, which is another reason that I think community custody is appropriate. We've got somebody that whether or not they committed that burglary was on the lam up here with gang members, drugs, and at least in proximity to a gun and, you know, the State's theory is, I've been very clear about is that he was the one who was in possession of the gun. This is not somebody that we think needs – that we think can be trusted to go without community custody even on the drug offense. I have no problem with him somehow transferring his community custody to Nevada. I have no problem with him sitting here with a probation warrant out of Washington – courtroom somewhere while his case sits in Nevada either. I just think that at some point this guy needs to be supervised and somebody needs to take a look at this, at least check him for drug and alcohol issues, if not go along with any treatment which we don't know whether he needs it or not, and the mere fact that we're shipping him to Nevada to be their problem doesn't make

his problems go away. And it doesn't make it our problem because the last time he was in trouble in Nevada, he came here. It might happen again. (6/18/15 RP 7-8).

The defense countered:

Yeah, I'd like to just bring us back to reality and reasonableness of the fact that in this car driver who was a meth user and a gang member doesn't have any bearing on the fact that my client was a passenger in the car. There was also a passenger in the backseat. Naturally, the driver who has the car is not going to want to tell the officers, not only do I have methamphetamine, but I also have a gun that I'm not allowed to have. My client doesn't have any felony criminal history, none. Were it not for the extradition we might have a different resolution, so I don't think that we can attribute, certainly under the law, we can't attribute the firearm in the driver's compartment somewhere to my client. He hasn't owned the car, it's not – the person who owns it is not related to him. He was simply getting a ride from somebody in the community. My client is not identified as a gang member.

The Vicodin, he – what he says is consistent with the police reports, you know, it was found on the floorboard. The officer says that it fell, I don't know whether the officer saw it fall from anywhere because it doesn't say that. It was on the floorboard, he didn't notice it before and there it was. There's a lot of stuff in that car, so I think the fact that my client has no felony criminal convictions. He doesn't have a drug history. He doesn't have a gun history. He has nothing else. He's going to Carson, and by the way, Nevada charged him with a crime. He's not somebody who's convicted in Nevada and then ran away from parole. He's not on the lam from anywhere. . . We're not talking about somebody that had, you know, has a history of drug use,

someone with a history of felonies, somebody with – who was out DUI [sic], it's not his car. We know for a fact that other people in the car, the driver for sure, has a problem and I believe even the backseat passenger had cocaine. So we had a meth addict and a cocaine addict. My client doesn't have anything to do with meth, cocaine, pot, or anything else. . .

Actually, I don't think that he is into Vicodin either, but the law says did you possess it or were you able to get control of it constructively and because he knew it was there, that's true. So, I think when we're talking about justice and what's reasonable and what's actually going to happen, the fact is he's going to be extradited to Nevada and the idea that we should just impose probation when it's discretionary because somehow the prosecutor thinks he's a bad guy and we need to keep an eye on him is silly. Nevada, if he's really bad guy, is going to have him on probation in Nevada. We're going to make him drive back up to Washington for DOC to evaluate him and say, you don't meet our criteria because that's another thing the State routinely says is, yeah, I know it's his first offense but he needs 12 months community custody and if DOC doesn't want to supervise him, they'll turn him loose but we need to order it.

So it's arguing out of both sides of your mouth for the State to presume that we should do community custody. It doesn't make any sense at all. It's a waste of resources. It's really a way to screw around with my client and say, not only do you have to go down there and deal with that, but in six months when you get released or whenever you're done with that, maybe they have prison, I don't know what the deal is in Nevada because he hasn't been found guilty, then by the way, come back to Washington and do 12 months of community custody with no family, no home, no job, no nothing. That doesn't make any

sense. That's really just a way to say we can control you and he's not the guy that we need to be worrying about in our system. It just doesn't make any sense. (6/18/15 RP 8-10).

After listening to the argument of counsel, the court pronounced sentence:

Well, I'm going to find that you have a limited ability to pay. Fines will be set at \$1,100.00, cost of incarceration capped at zero. You'll have a 36-day sentence, 36 days credit, community custody. I'm going to leave him on community custody. I know it's a pain but the reality is confronting another charge in another state, if you were, a local fellow, I wouldn't hesitate to impose community custody. I hate to have him put up a criminal issue in another state and drop the community custody because the [inaudible] can mean that – and I guess I – you're getting out, it should be a pain for you, too. It should be something that you don't like, so you don't do it again or I hope you don't, but – . (6/18/15 RP 12).

The court sentenced Mr. Hernandez-Rivera to 36 days with credit for 36 days served and imposed community custody of 12 months. (CP 18, 19). This appeal follows. (CP 28).

### III. ARGUMENT

A. The court abused its discretion by ordering community custody in light of its consideration of matters in violation of the real facts doctrine and Mr. Hernandez-Rivera's extradition to Nevada.

In its discretion, the court may order up to one year of community custody if the total period of confinement is not more than 12 months and the offense is under Chapter 69.50 RCW or 69.52 RCW. RCW 9.94A.702(1)(d). Mr. Hernandez-Rivera's sentence and offense falls into this category. (CP 4, 17-18).

An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). An incorrect legal analysis or error of law can constitute an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The court considered and relied on matters in violation of the real facts doctrine when it imposed community custody. RCW 9.94A.530(2). This error of law was an abuse of discretion.

The real facts doctrine is embodied in RCW 9.94A.530(2), which states in relevant part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to

criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. . .

Mr. Hernandez-Rivera disputed all the information argued by the State that had not been admitted in the plea agreement.

(6/18/15 RP 8-10). The only admitted information was he knew Vicodin was in the car. (*Id.* at 7). In arguing for community custody, however, the State specifically referenced the declaration of probable cause containing information not admitted by Mr. Hernandez-Rivera and for which the State had no proof, as acknowledged by the deputy prosecutor. (See 6/18/15 RP 6-7). The State indicated a gun found by the police was Mr. Hernandez-Rivera's although the deputy prosecutor could not prove it. The State also claimed he was a gang member. (*Id.* at 5-6). The deputy prosecutor admitted "I bring that up with a couple of other factors that are going to contribute to the State's argument for community custody." (*Id.* at 6).

But Mr. Hernandez-Rivera did not admit any of this information offered by the State to convince the judge the defendant was dangerous and deserved community custody to teach him a lesson. (*Id.* at 7-10). When the information is

disputed, as here, the court cannot consider it as no evidentiary hearing was held on the point. RCW 9.94A.530(2). In violation of the real facts doctrine, the court did consider the information.

Imposing sentence, the judge stated he was going to leave Mr. Hernandez-Rivera on community custody because “it’s a pain” and “it should be a pain for you, too.” (6/18/15 RP 12). That is no reason at all. It is clear from the record the judge considered the information from the State about gun ownership and his supposed gang ties from paraphernalia found in the car, where he was only a passenger. (*Id.* at 6,13). This was an error of law constituting an abuse of discretion. *Tobin*, 161 Wn2d at 523.

And even aside from the error of law, the decision to impose community custody was not based on tenable grounds or tenable reasons as Mr. Hernandez-Rivera was being extradited to Nevada, so it served no useful purpose. As argued by the defense, the community custody was a waste of resources as he would then be forced to return to Washington after resolving his pending felony charge in Nevada. (6/18/15 RP 10). Moreover, he could not timely report to DOC for the community custody as directed by the court because of his extradition. (CP 19). The community custody set him up to fail when there was no good reason to impose it under

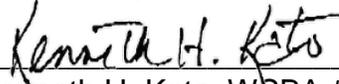
the circumstances. The court abused its discretion. *Junker*, 79 Wn.2d at 27.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hernandez-Rivera respectfully urges this Court to reverse the imposition of community custody and remand for elimination of that requirement in the judgment and sentence.

DATED this 12<sup>th</sup> day of April, 2016.

Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I certify that on April 12, 2016, I served a copy of the Brief of Appellant by USPS on Luis Hernandez-Rivera at his last known address: Yakima County DOC, 111 N. Front St., Yakima, WA 98901; and by email, as agreed, on Tamara Hanlon at tamara.hanlon@co.yakima.wa.us.

