

Nos. 33836-3-III,  
33812-6-III

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

**FILED**  
**Oct 12, 2016**  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

TAYLOR ROSS LANDRUM,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Judge Cameron Mitchell

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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

A. INTRODUCTION.....3

B. ARGUMENT IN REPLY.....3

    1. The case should be remanded to the trial court to vacate the post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.....3

    2. This Court should consider Mr. Landrum’s challenges to specified conditions of community custody.....5

    3. The case should be remanded with an order that the trial court revise community custody condition (13) to specify a more narrow application for polygraph testing.....7

C. CONCLUSION.....9

**TABLE OF AUTHORITIES**

Washington Supreme Court

*State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993).....6, 7

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).....4, 5

*State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998).....8

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).....4, 5

*State v. Wheeler*, 183 Wn.2d 71, 349 P.3d 820 (2015).....6, 7

Washington Courts of Appeal

*State v. Clausen*, No. 43166-1-II,  
2014 WL 2547604 (Wash. Ct. App. June 3, 2014).....8

*State v. Muonio*, No. 45016-0-II,  
2014 WL 6068372 (Wash. Ct. App. Nov. 13, 2014).....4, 5

*State v. Traicoff*, 93 Wn. App. 248, 967 P.2d 1277 (1998).....7

Washington Statutes

RCW 7.90.150(6)(a).....3, 4

Washington Court Rules

GR 14.1(a).....1, 8

RAP 2.5(c)(1).....6, 7

## A. INTRODUCTION

Appellant Taylor Ross Landrum accepts this opportunity to reply to the State's brief. Mr. Landrum requests that the Court refer to his opening brief for issues not addressed in this reply.

## B. ARGUMENT IN REPLY

### **1. The case should be remanded to the trial court to vacate the post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.**

This argument pertains to Issue 2 raised in Mr. Landrum's opening brief. Mr. Landrum argues he was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. *See* Appellant's Opening Brief pgs. 11-15. Mr. Landrum argues that under the plain language of the statute, RCW 7.90.150(6)(a), post-conviction sexual assault protection orders are only authorized for the victims of a sex offense conviction, not witnesses. *See* Appellant's Opening Brief pg. 13.

The State argues "[t]here is no reason to suggest that the legislature wanted the statute [RCW 7.90.150] to be interpreted conservatively to exclude victims not named in an Information . . . it should be interpreted as including victims of a defendant whose testimony is admitted under ER 404(b) to show motive, common scheme or plan, or lack of accident." *See* Respondent's Brief pgs. 5-6.

Contrary to the State’s arguments, albeit as nonbinding authority, Division 2 of this Court held that under RCW 7.90.150(6)(a), “the ‘victim’ of a sex crime is the direct victim only.” *State v. Muonio*, No. 45016-0-II, 2014 WL 6068372, at \*7 (Wash. Ct. App. Nov. 13, 2014); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013). The court reasoned that “read plainly, the term ‘victim’ refers to the direct victim of the crime charged.” *Id.* at \*6. Accordingly, the court vacated a post-conviction sexual assault protection order protecting an individual who was not a direct victim of the crime charged. *Id.* at \*7.

Here, Mr. Landrum was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the entry of post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Under the plain meaning of RCW 7.90.150(6)(a), the trial court was not authorized to issue post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J. *See Muonio*, 2014 WL 6068372, at \*6-7. Therefore, defense counsel’s failure to object to the entry of these orders was deficient performance. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26) (setting forth the two-part test for ineffective assistance of counsel).

The State argues there was no prejudice to Mr. Landrum, because the trial court “may have issued an Anti-Harassment No-Contact Order.” *See* Respondent’s Brief pg. 6. However, for ineffective assistance of counsel, a defendant establishes prejudice if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See McFarland*, 127 Wn.2d at 335 (*citing Thomas*, 109 Wn.2d at 225-26). Here, Mr. Landrum establishes prejudice because had trial counsel objected to the entry of these orders, the request would have been granted, and therefore, the result of the proceeding would have been different. *See Muonio*, 2014 WL 6068372, at \*6-7.

The case should be remanded to the trial court to vacate the post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.

**2. This Court should consider Mr. Landrum’s challenges to specified conditions of community custody.**

This argument pertains to Issue 4 raised in Mr. Landrum’s opening brief. Mr. Landrum argues the trial court erred in imposing specified conditions of community custody. *See* Appellant’s Opening Brief pgs. 17-24.

The State argues Mr. Landrum cannot challenge these community custody conditions in this appeal, because he did not challenge them in his first appeal, and following remand, the trial court “limited himself to resentencing the defendant following the reversal of three counts of Solicitation to Commit Perjury in the First Degree and reconsideration of the order sealing the juror questionnaires.” *See* Respondent’s Brief pgs. 7-8.

Under RAP 2.5:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1).

This rule “pertains to the common law ‘law of the case’ doctrine, which, among other things, treated some legal rulings in a case as binding on the parties if not appealed.” *State v. Wheeler*, 183 Wn.2d 71, 78, 349 P.3d 820 (2015). The rule permits a party to raise an issue not raised in an earlier appeal under the following circumstances:

RAP 2.5(c)(1) puts some restrictions on the law of the case doctrine, but it “does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.”

*Id.* (quoting *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)).

The rule is permissive, not mandatory: if the trial court revisits an issue on remand which was not the subject of the first appeal, “the appellate court *may* review such issue.” *Barberio*, 121 Wn.2d at 51 (emphasis in original).

Here, Mr. Landrum did not challenge the imposed community custody conditions in his first appeal. (CP 23-60, 447-484). Following his first appeal, this Court remanded the case to the trial court for resentencing. (CP 23, 59, 447, 483).

At Mr. Landrum’s resentencing, the trial court exercised its independent judgment regarding whether to impose community custody

conditions. (RP (Sept. 18, 2015) 41-42, 109-110, 120). The State requested the conditions, Mr. Landrum himself objected to the imposition of all of the community custody conditions, and the trial court imposed community custody conditions, after noting Mr. Landrum's objection. (RP (Sept. 18, 2015) 41-42, 109-110, 120). Thus, the trial court reviewed and ruled again on community custody issues at the resentencing hearing. *Cf. State v. Traicoff*, 93 Wn. App. 248, 257-58, 967 P.2d 1277 (1998) (declining to address the defendant's challenge to specified community placement conditions in his second appeal, where the trial court on remand did not reconsider the challenged conditions).

Therefore, because the trial court exercised independent judgment regarding whether to impose community custody conditions, this Court should exercise its discretion and consider Mr. Landrum's challenges to specified conditions of community custody. *See* RAP 2.5(c)(1); *Wheeler*, 183 Wn.2d at 78; *Barberio*, 121 Wn.2d at 50-51.

**3. The case should be remanded with an order that the trial court revise community custody condition (13) to specify a more narrow application for polygraph testing.**

This argument also pertains to Issue 4 raised in Mr. Landrum's opening brief. Mr. Landrum argues the trial court erred in imposing community custody condition (13), requiring Mr. Landrum to "[s]ubmit to polygraph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense[,]" because the condition is overbroad. *See* Appellant's Opening Brief pg. 23. Mr. Landrum argues this

condition should be rewritten to specify a more narrow application, limiting the polygraph testing to monitor compliance with community custody. *See* Appellant’s Opening Brief pgs. 23-24.

The State argues “*State v. Riles* should resolve this issue. The *Riles* Court upheld the same condition . . . .” *See* Respondent’s Brief pg. 10; *see also State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998).

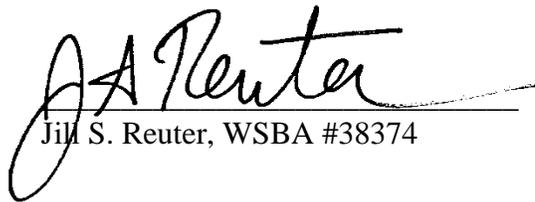
In *Riles*, our Supreme Court held “[t]rial courts have authority to require polygraph testing . . . to monitor compliance with other conditions of community placement.” *Riles*, 135 Wn.2d at 351-52. Subsequently, albeit as nonbinding authority, Division 2 of this Court accepted the State’s concession that a substantially similar community custody condition to the one imposed here was overbroad, by “giv[ing] the [community corrections officer] unfettered discretion to include any subject in the polygraph.” *State v. Clausen*, No. 43166-1-II, 2014 WL 2547604, at \*7 (Wash. Ct. App. June 3, 2014); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013). The court remanded the case to more narrowly tailor the polygraph testing. *See id.* at \*7-8.

Accordingly, the case should be remanded with an order that the trial court revise community custody condition (13) to specify a more narrow application for polygraph testing, to limit the polygraph testing to monitor compliance with community custody. *See Clausen*, 2014 WL 2547604, at \*7-8.

**C. CONCLUSION**

Based upon the arguments set forth above and those set forth in Mr. Landrum’s opening brief, this Court should remand the case for: (1) resentencing within the standard range on the solicitation to commit first degree perjury count; (2) the trial court to vacate the post-conviction sexual assault protection orders for witnesses J.R., A.M., M.J.; (3) the trial court to strike community custody conditions (10), (14), (15), (16), (20), (21), (22) and (25) and revise community custody condition (13) to limit the polygraph testing to monitor compliance with community custody; (4) the trial court to strike the \$60 sheriff’s service fee, and correct the total LFO amount to \$700 in each Judgment and Sentence; and (5) the trial court to correct each judgment and sentence to reflect that Mr. Landrum was sentence under RCW 9.94A.712, rather than RCW 9.94A.507. Mr. Landrum also objects to any appellate costs should the State prevail on appeal.

Respectfully submitted this 12th day of October, 2016.

  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA Nos. 33836-3-III,  
 ) 33812-6-III  
vs. )  
 )  
TAYLOR ROSS LANDRUM )  
 ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 12, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Taylor Ross Landrum, DOC #889074  
Coyote Ridge Correction Center  
PO Box 769  
Connell, WA 99326

Having obtained prior permission from the Benton County Prosecutor's Office, I also served the Respondent State of Washington by e-mail at prosecuting@co.benton.wa.us using Division III's e-service feature.

Dated this 12th day of October, 2016.



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