

82731-1

NO. 36029-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

EDUARDO SANCHEZ,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 21 AM 11:57  
STATE OF WASHINGTON  
BY *[Signature]*  
DEROY

---

BRIEF OF APPELLANT

---

LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

P. O. Box 1396  
Longview, WA 98632  
(360) 425-8155

*P. M. 2-19-2008*

**TABLE OF CONTENTS**

	Page
<b>A. ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>1. THE TRIAL COURT ERRED IN FINDING EDUARDO SANCHEZ GUILTY OF POSSESSION OF MARIJUANA WITH INTENT TO DELIVER AS THERE WAS INSUFFICIENT PROOF THAT SANCHEZ POSSESSED MARIJUANA.....</b>	<b>1</b>
<b>2. THE TRIAL COURT ERRED IN FINDING EDUARDO SANCHEZ GUILTY OF CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DELIVER AS THERE WAS INSUFFICIENT PROOF THAT SANCHEZ POSSESSED MARIJUANA OR CONSPIRED WITH ANYONE TO DELIVER MARIJUANA.....</b>	<b>1</b>
<b>3. THE TRIAL COURT ERRED IN ENTERING A VAGUE COMMUNITY CUSTODY CONDITION THAT SANCHEZ CANNOT POSSESS DRUG PARAPHERNALIA. ....</b>	<b>1</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>1. DOES A TRIAL COURT DENY A DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT IF IT ENTERS JUDGMENT AGAINST THAT DEFENDANT FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE?.</b>	<b>1</b>
<b>2. DOES A TRIAL COURT VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, IF IT IMPOSES A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT THE DEFENDANT ON NOTICE OF WHAT CONDUCT IT PROHIBITED?.....</b>	<b>1</b>

**3. DOES THE COURT OF APPEALS' REFUSAL TO ADDRESS A CONSTITUTIONAL CHALLENGE TO A COMMUNITY CUSTODY CONDITION AS NOT RIPE FOR ADJUDICATION VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS THE DEFENDANT'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22? ..... 2**

**C. STATEMENT OF THE CASE..... 2**

**(1) Factual History ..... 2**

**D. ARGUMENT..... 8**

**I. THE TRIAL COURT DENIED SANCHEZ DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENTS AGAINST HIM FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE..... 9**

**II. THE TRIAL COURT VIOLATED SANCHEZ'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT HIM ON NOTICE OF WHAT CONDUCT IT PROHIBITS. .... 13**

**III. THIS COURT'S REFUSAL TO ADDRESS ARGUMENT II AS NOT RIPE WILL VIOLATE SANCHEZ'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS SANCHEZ'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22. .... 16**

**E. CONCLUSION..... 22**

**F. APPENDIX.....23**

## TABLE OF AUTHORITIES

Page

### Cases

<i>Douglas v. California</i> , 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) .....	18
<i>Hi-Starr, Inc. v. Liquor Control Bd.</i> , 106 Wash.2d 455, 722 P.2d 808 (1986).....	14
<i>In re Frampton</i> , 45 Wn.App. 554, 726 P.2d 486 (1986) .....	18
<i>In re Messmer</i> , 52 Wn.2d 510, 326 P.2d 1004 (1958).....	19
<i>In re Petrie</i> , 40 Wn.2d 809, 246 P.2d 465 (1952).....	19
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) .....	9
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).....	10
<i>Myrick v. Board of Pierce Cy. Comm'rs</i> , 102 Wn.2d 698, 677 P.2d 140 (1984).....	13
<i>Rheuark v. Shaw</i> , 628 F.2d 297, (5th Cir.1980), <i>cert. denied</i> , 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981).....	18
<i>Seattle v. Shepherd</i> , 93 Wash.2d 861, 613 P.2d 1158 (1980).....	14
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	9
<i>State v. Aver</i> , 109 Wn.2d 303, 745 P.2d 479 (1987).....	14
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	9
<i>State v. Collins</i> , 2 Wn.App. 757, 470 P.2d 227, 228 (1970).....	10
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	18

<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974) .....	10
<i>State v. Langland</i> , 42 Wn. App. 287, 711 P.2d 1039 (1985) .....	17, 19
<i>State v. Mace</i> , 97 Wn.2d 840, 650 P.2d 217 (1982) .....	10, 11
<i>State v. Massey</i> , 81 Wn. App. 198, 913 P.2d 424 (1996) .....	17, 19
<i>State v. Miller</i> , 103 Wash.2d 792, 698 P.2d 554 (1985) .....	14
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972) .....	9
<i>State v. Motter</i> , 139 Wn. App. 797; 162 P.3d 1190 (2007) ....	16, 17, 19, 21
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987) .....	18
<i>State v. Rutherford</i> , 63 Wn.2d 949, 389 P.2d 895 (1964) .....	18
<i>State v. Simpson</i> , 136 Wn.App. 812, 150 P.3d 1167 (2007) .....	13
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973) .....	10
<i>State v. Worrell</i> , 111 Wn.2d 537, 761 P.2d 56 (1988) .....	13, 14

### **Statutes**

RCW 9A.52.030(1) .....	11
------------------------	----

### **Other Authorities**

United States Constitution, Fourteenth Amendment .....	
..... i, ii, 1, 2, 8, 9, 13, 16, 17, 19, 23	
WAC 137-104-050 .....	20, 21, 24
Washington Constitution, Article 1, Section 3 and Section 22	
..... i, ii, 1, 2, 8, 9, 13, 16, 17, 19, 23	

**A. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED IN FINDING EDUARDO SANCHEZ GUILTY OF POSSESSION OF MARIJUANA WITH INTENT TO DELIVER AS THERE WAS INSUFFICIENT PROOF THAT SANCHEZ POSSESSED MARIJUANA.**
- 2. THE TRIAL COURT ERRED IN FINDING EDUARDO SANCHEZ GUILTY OF CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DELIVER AS THERE WAS INSUFFICIENT PROOF THAT SANCHEZ POSSESSED MARIJUANA OR CONSPIRED WITH ANYONE TO DELIVER MARIJUANA.**
- 3. THE TRIAL COURT ERRED IN ENTERING A VAGUE COMMUNITY CUSTODY CONDITION THAT SANCHEZ CANNOT POSSESS DRUG PARAPHERNALIA.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. DOES A TRIAL COURT DENY A DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT IF IT ENTERS JUDGMENT AGAINST THAT DEFENDANT FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE?**
- 2. DOES A TRIAL COURT VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, IF IT IMPOSES A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT THE DEFENDANT ON NOTICE OF WHAT CONDUCT IT PROHIBITED?**

3. **DOES THE COURT OF APPEALS' REFUSAL TO ADDRESS A CONSTITUTIONAL CHALLENGE TO A COMMUNITY CUSTODY CONDITION AS NOT RIPE FOR ADJUDICATION VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS THE DEFENDANT'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22?**

**C. STATEMENT OF THE CASE**

**(1) Factual History**

In August of 2006, agents of the Cowlitz County Drug Task Force contacted Vancouver Police Detective Bryan Acee. Detective Acee is a member of the Southwest Washington Career Criminal Apprehension Team. The Cowlitz County Task Force asked Detective Acee to conduct surveillance on Jesus Gonzalez-Perez. Gonzalez-Perez lived at 2612B Grand Boulevard in Vancouver. RP 132-136.<sup>1</sup> According to the Cowlitz detectives, Jesus Gonzalez-Perez is a "major drug trafficker" with some thirty people working below him, including brothers Loreano and Albert Valencia-Rojas. *Id.* After receiving this information, Detective Acee coordinated surveillance on the Grand Boulevard address, which included hundreds of hours of surveillance by multiple officers. RP 136-178.

---

<sup>1</sup>The trial record in this case includes five volumes of continuously number verbatim reports, referred to herein as "RP." Reference to any other verbatim prepared for this appeal will be identified as other than just "RP."

Initially, Detective Acee identified about six vehicles regularly parked at the Grand Boulevard address, each one of which was registered to Rene Turner. RP 136-137. The utilities and telephone at that address were in Ms Turner's name, and Detective Acee saw her and her infant child at the address on numerous occasions. *Id.* He also regularly saw Mr. Gonzalez-Perez, Alberto Valencia-Rojas and Loreano Valencia-Rojas at the address. RP 120-140. During their surveillance activities, Detective Acee and those working under him saw dozens of people come to the address each day for short periods of time, and on one occasion he observed some type of hand to hand transaction between a visitor and someone who came out of the house. RP 136-138.

At the end of August, Detective Acee saw the occupants at the Grand Boulevard address move boxes and personal items from that residence to a house at 806 S.E. 141<sup>st</sup> Street in Vancouver. RP 140. These people included Rene Turner, Alberto Valencia-Rojas, and Alberto's brother Loreano. RP 140-154. Ms Turner put the utilities and the telephone for the new address in her name. *Id.* After the move, the suspicious activities continued, with numerous persons coming to the new house every day for a few minutes. Also, the officers followed Mr. Gonzalez-Perez one time when he drove to a location in Vancouver and

met with persons Detective Acee knew to be members of the "Norteno" Hispanic gang. RP 140-157.

On October 18, 2006, Detective Acee obtained a warrant to search the house at 806 S.E. 141<sup>st</sup> Street, as well as the persons of Rene Turner, Jesus Gonzalez-Perez, Alberto Rojas-Valencia, and Loreano Rojas-Valencia. RP 161-162. On October 21, 2006, Detective Acee returned to the house with a number of other officers to perform surveillance for a number of hours prior to executing the warrant. *Id.*

When Detective Acee arrived on the morning of October 21st, he saw a number of people drive up to the house, enter, and then leave carrying one or two black plastic garbage bags that appeared to have something light in them. RP 163-173. One of these people was Mark Turner. RP 168-172. After Turner left, Detective Acee had two other officers stop the vehicle, arrest Turner, and search his car. RP 273-283. This search uncovered a backpack located behind the driver's seat with a black plastic garbage bag in it that contained a clear plastic bag that contained about one pound of marijuana. *Id.*

Although Sanchez had never been seen during the surveillance at the new residence, he was one of the people who arrived and departed on October 21 prior to Turner. RP 223. Sanchez arrived at the house driving a burgundy Dodge Intrepid. Sanchez went into the house and emerged

about 15 minutes later carrying two large garbage bags. He placed the bags in the trunk of the car and drove off. RP 167. The police tried to follow Sanchez but could not stay up with him. RP 167-68. A number of officers had followed the vehicles leaving the house that morning but the drivers employed counter-surveillance driving techniques and lost the tailing officers. RP 125-132.

Eventually, after all of the vehicles at the residence were gone, the officers executed the search warrant. RP 178-195, 248-272, 298-311, 395-438, 439-453. Upon entering, they found no one in the residence. *Id.* Most of the officers smelled the odor of fresh marijuana when they entered. On the floor of a closet in a bedroom designated as “bedroom 2”, the officers found 68 one-pound clear plastic bags of marijuana. *Id.* Also in the house and in a backyard shed, officers found scales, prepaid cell phones, black plastic garbage bags, a loaded pistol, paperwork belonging to Rene Turner, Alberto Rojas-Valencia, and Loreano Rojas-Valencia, and in “bedroom 1” a bag containing \$126,000.00 in cash. *Id.* In bedroom 2, the officers found a shirt with a receipt in the pocket indicating that Sanchez had wired \$2,000 to Mexico earlier in the month. RP 330-31.

After securing and searching the house, the officers hid their vehicles, and then returned to the residence to await people to return. RP

200-202. At about 5:50 pm, Renee Turner returned to the residence driving a Chevy Tahoe. RP 202-203. Alberto Valencia was in the front passenger seat and their baby was in an infant seat. *Id.* They had left earlier with two black garbage bags. *Id.* When they returned, the officers arrested them. *Id.* The officers found a loaded handgun in the glove compartment of the truck. *Id.* The police officer found some paperwork within the center console of the Tahoe addressed to Sanchez at 2610 Grand Boulevard, Apartment A, Vancouver. RP 417. A number of the other people who had left the residence earlier returned after Ms. Turner and they were all arrested. RP 205-221. Sanchez was the last to arrive and drove the burgundy Intrepid he'd left in that morning. The car smelled of fresh marijuana. Sanchez had about \$8,500.00 cash in his pocket. *Id.* Sanchez explained to the police that he borrowed the money to buy a car.

## **(2) Procedural History**

By information filed October 26, 2006, the Clark County Prosecutor charged defendant Sanchez with possession of marijuana with intent to deliver and conspiracy to deliver marijuana (counts 7 and II, respectively). CP 1-4. The possession with intent charge included an allegation that the offense occurred within 1,000 feet of a school bus stop

*Id.* The case later came on for trial before a jury along with the trial of a co-defendant named Isidro Valencia Sanchez. RP 1.

During the jury trial, the state called and recalled seven police officers, including Detective Acee. RP 152, 248, 273, 283, 347, 395, 439, 462, 482. The state also called an evidence technician from the Vancouver Police Department who tested the marijuana. RP 379. Finally, the state called a school district employee and a Clark County GIS technician. RP 519, 530. The former identified two school bus stops in the vicinity of 806 141<sup>st</sup> Street in Vancouver. RP 519-529. The latter testified that the house and the bus stops were much less than 1,000 feet apart. RP 530-543. After the state finished with its witnesses, Sanchez called three short witnesses. RP 556-580. Sanchez or his co-defendant testified.

The court instructed the jury without objection from the defendant. RP 584-586. The parties presented closing arguments without objection. RP 604-671. The jury later returned verdicts of guilty on both charges, along with a special verdict that the possession with intent to possess marijuana was committed within 1,000 feet of a school bus stop. RP 98-99.

At sentencing, the court determined that both the possession with intent charge and the conspiracy charge constituted the same criminal

conduct under RCW 9.94A.589. CP 106. The court then sentenced the defendant within the standard range, adding 24 months for the school bus stop enhancement, and including a term of community custody. CP 105-120. The community custody conditions included the following:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 112.

After sentencing, the defendant filed timely notice of appeal. CP

104.

On June 14, 2007, Sanchez was returned to Clark County to correct a error in calculating the application of the school bus enhancement to his standard sentence. RP 6/14/07 4. An amended judgment and sentence was entered. See Supp. Designation of CP. The amended judgment and sentence included the same paraphernalia community custody condition. See Supp. Designation CP.

#### **D. ARGUMENT**

##### **I. THE TRIAL COURT DENIED SANCHEZ DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENTS**

**AGAINST HIM FOR OFFENSES UNSUPPORTED  
BY SUBSTANTIAL EVIDENCE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the

truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city) at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows: second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle. RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. ***There was no direct evidence, only inferences***, that he had committed second degree burglary by entering the premises in Richland.

*State v. Mace*, 97 Wn.2d at 842 (emphasis added).

Under our facts, the state charged Sanchez with possession of marijuana with intent to deliver and conspiracy to possess marijuana with intent to deliver. In support of this charge the police and the state went to great lengths to prove that Jesus Gonzalez-Perez was running a marijuana distribution ring from the first and second house in which he was residing in Vancouver. In support of this claim, the state presented evidence that numerous pounds of marijuana and \$126,000.00 cash was found in the house Jesus Gonzalez-Perez shared with Alberto and Loreano Rojas-Valencia and Alberto's girlfriend Rene Turner. The officers who spent

many hours of surveillance determined that dozens of people routinely made very short visits to the house. The problem with this evidence is that none of it relates to defendant Sanchez. The only time the police ever saw Sanchez at the new house was on the day they executed the search warrant. Not once, in spite of the hundreds if not thousands of hours of surveillance time, did the police ever see Sanchez associated with any drug activity.

It is true that the police saw Sanchez take a black garbage bag out of the house and leave in one of the cars registered to Rene Turner. During the trial, the state argued that there must have been marijuana in that bag. However, the bag was never recovered. Neither was any marijuana found in the car when Sanchez returned. Although Sanchez had money on him, that was readily explained by Sanchez borrowing money to buy a car. That he needed a car was apparent from the fact that he had earlier driven Ms. Turner's car and not a car registered to Sanchez himself. And while Detective Acee believed he smelled marijuana in the car, he didn't claim that he smelled any marijuana on Sanchez's person.

The state's case against Sanchez was based solely upon mere possibility, suspicion, speculation, and conjecture. Certainly Sanchez might have knowingly had marijuana in the bag and might have intended to deliver it to another person and conspired with another to do so.

However, the evidence is also as consistent with the conclusion that either there was not marijuana in the bag, or if there was he didn't know this fact and did not intend to deliver any drug. Such evidence does not prove beyond a reasonable doubt that Sanchez even possessed marijuana, let alone knew it was marijuana, intended to deliver it, and conspired with out to make it happen. Thus, this court should reverse the Sanchez's conviction and remand with instructions to dismiss.

**II. THE TRIAL COURT VIOLATED SANCHEZ'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT HIM ON NOTICE OF WHAT CONDUCT IT PROHIBITS.**

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, which had the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn.App. 812, 150 P.3d 1167 (2007).

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

*Aver*, 109 Wn.2d at 306-07.

Under our facts, the following community custody condition the court imposed in this case violates due process because it is void for vagueness.

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police

scanners, and hand held electronic scheduling or data storage devices.

CP 112; Supp. Designation of CP.

In this provision the phrase “any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances” is hopelessly vague. Literally, any item from a toothpick up to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and are used to facilitate the transfer of drugs. Is the defendant prohibited from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the defendant prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is the defendant prohibited from using a blender? Matches are often used as a source of phosphorous in the manufacture of methamphetamine. Is the defendant prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. Is the defendant prohibited from possessing cigarette paper? Baggies are often used to contain controlled substances. Is the defendant now forced to only used waxed paper to wrap his sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps

the defendant will be in violation if he possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase “any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances” is so vague as to leave the defendant open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

**III. THIS COURT’S REFUSAL TO ADDRESS ARGUMENT II AS NOT RIPE WILL VIOLATE SANCHEZ’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS SANCHEZ’S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.**

In a recent decision this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In this case, *State v. Motter*, 139 Wn. App. 797; 162 P.3d 1190 (2007), a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that violated certain

constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing “drug paraphernalia” which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter’s challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law’s constitutionality is not ripe for review unless the challenger was harmed by the law’s alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter’s challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

*Motter*, 139 Wn. App. at 804.

This decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it under our facts this court violates Sanchez’s right to procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying Sanchez appellate

review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheurark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule, the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum,

procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

*In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in this case is that probation violation

claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender

disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate

level to challenge the constitutionality of the community custody conditions imposed by the court. This section, WAC 137-104-080, states as follows:

- (1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.
- (2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:  
(a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.
- (3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions

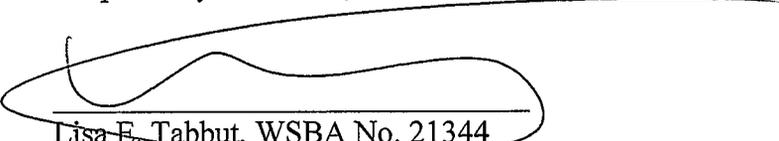
may be heard as part of a direct appeal from the imposition of the sentence.

**E. CONCLUSION**

Substantial evidence does not support the charges for which Sanchez was convicted. As result, this court should vacate the conviction and remand with instructions to dismiss. In the alternative, the court should vacate the community custody condition that is unconstitutionally vague.

DATED this 18th day of February, 2008.

Respectfully submitted,



\_\_\_\_\_  
Lisa E. Tabbut, WSBA No. 21344  
Attorney for Appellant

**F. APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases:

Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

...

**WAC 137-104-050**

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

**WAC 137-104-080**

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

08 FEB 21 AM 11:57

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,	)	No. 36029-2-II
	)	
Respondent,	)	AFFIDAVIT OF MAILING
	)	
vs.	)	
	)	
EDUARDO SANCHEZ,	)	
	)	
Appellant.	)	

LISA E. TABBUT, being sworn on oath, states that on the 19th day of February 2008, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Michael C. Kinnie  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

And

John A. Hays  
Attorney at Law  
1402 Broadway  
Longview, WA

And

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT

ATTORNEY AT LAW

P.O. Box 1396 • Longview, WA 98632  
Phone: (360) 425-8155 • Fax: (360) 425-9011

1  
2  
3 Eduardo C. Sanchez/DOC# 304682  
4 Olympic Corrections Center  
5 11235 Hoh Mainline  
6 Forks, WA 98331-9492

7 and that said envelope contained the following:

- 8 (1) APPELLANT'S BRIEF  
9 (2) AFFIDAVIT OF MAILING

10 Dated this 19th day of February 2008

11 LISA E. TABBUT, WSBA #21344  
12 Attorney for Appellant

13  
14  
15 SUBSCRIBED AND SWORN to before me this 19th day of February 2008.



16  
17 Stanley W. Munger

18 Stanley W. Munger  
19 Notary Public in and for the  
20 State of Washington,  
21 Residing at Longview, WA  
22 Commission expires 05/24/08 \_\_\_\_\_

23  
24  
25  
AFFIDAVIT OF MAILING - 2 -

LISA E. TABBUT

ATTORNEY AT LAW

P.O. Box 1396 • Longview, WA 98632  
Phone: (360) 425-8155 • Fax: (360) 425-9011