

82731-1

FILED
COURT OF APPEALS
DIVISION II

08 MAY 11 PM 12:51

STATE OF WASHINGTON

DEPUTY

NO. 36029-2-II

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

STATE OF WASHINGTON, Respondent

v.

EDUARDO SANCHEZ AND ISIDORO SANCHEZ-VALENCIA,
Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.
06-1-02052-9 AND 06-1-02054-5

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. RESPONSE TO ASSIGNMENTS OF ERROR- SUFFICIENCY
OF EVIDENCE1

III. RESPONSE TO ASSIGNMENT OF ERROR- COMMUNITY
CUSTODY CONDITION19

IV. CONCLUSION.....24

TABLE OF AUTHORITIES

Cases

<u>In Re Personal Restraint of Lord</u> , 152 Wn.2d 182, 188, 94 P.3d 952 (2004).....	23
<u>City of Seattle v. Eze</u> , 111 Wn.2d 22, 27, 759 P.2d 366 (1988).....	20
<u>City of Spokane v. Douglass</u> , 115 Wn.2d 171, 178, 795 P.2d 693 (1990).....	19, 20
<u>In Re Personal Restraint of Cashaw</u> , 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994).....	22, 23
<u>In Re Personal Restraint of Cook</u> , 114 Wn.2d 802, 812, 792 P.2d 506 (1990).....	23
<u>In Re Personal Restraint of Dalluge</u> , 162 Wn.2d 814, 817, 177 P.3d 675 (2008).....	23
<u>In Re Personal Restraint of Garcia</u> , 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001).....	23
<u>In Re Personal Restraint of Isadore</u> , 151 Wn.2d 294, 299, 88 P.3d 390 (2004).....	23
<u>In Re Personal Restraint of Mattson</u> , 124 Wn. App. 130, 172 P.3d 719 (2007).....	22
<u>In Re Personal Restraint of Shepard</u> , 127 Wn.2d 185, 191, 898 P.2d 828 (1995).....	22
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	16
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	18
<u>State v. Fiser</u> , 99 Wn. App. 714, 718, 995 P.2d 107 (2000).....	16
<u>State v. Hughes</u> , 154 Wn.2d 118, 152, 110 P.3d 192 (2005).....	16
<u>State v. Jackson</u> , 129 Wn. App. 95, 109, 117 P.3d 1182 (2005)....	16
<u>State v. Langland</u> , 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985).....	21
<u>State v. Massey</u> , 81 Wn. App. 198, 200, 913 P.2d 424 (1996).....	21
<u>State v. Motter</u> , 139 Wn. App. 797, 162 P.3d 1190 (2007).....	20, 21, 23
<u>State v. Riles</u> , 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998).....	21
<u>State v. Smith</u> , 111 Wn.2d 1, 5, 759 P.2d 372 (1988).....	19

I. STATEMENT OF THE CASE

Because of the nature of the issues, the factual information will be set forth in the argument section of this brief.

Both defendants were convicted of Possession of a Controlled Substance with Intent to Deliver-Marijuana and Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver- Marijuana. There was a school bus zone enhancement also included.

II. RESPONSE TO ASSIGNMENTS OF ERROR-
SUFFICIENCY OF EVIDENCE

Both defendants have raised the question of sufficiency of evidence to find them guilty of the crimes of Possession of a Controlled Substance with Intent to Deliver and Conspiracy to commit Possession of Controlled Substance with Intent to Deliver.

During its case in chief, the State called at least seven detectives involved with the drug task force in working in either the Vancouver Police Department or the Clark County Sheriff's Office. They all testified concerning the surveillance and ultimate search warrant that was issued on a residence of 806 SE 141 Avenue, Vancouver, Clark County, Washington. The surveillance of the residence (it began at a different residence located at 2612 Grand

Boulevard, Vancouver, Washington and then the parties relocated to 806 141 SE Avenue) started in approximately August 2006 and culminated in the execution of the search warrant which took place on October 21, 2006.

First officer called by the State in its case in chief was a Detective Bryan Acee, Detective with the Vancouver Police Department. The detective detailed his extensive drug training to the jury. (RP 120 – 125). His training included among other things upper levels of international drug trafficking, all the way down to packaging and development of narcotics and the actual application of loading a syringe. He learned how to cut cocaine preparing it for injection and the packaging and cultivation of numerous types of illicit substances (RP 122). The drugs he was specifically trained in were cocaine, heroin, marijuana, methamphetamine, opiates, and steroids. (RP 122, L. 25 – 123 L. 1). He has also completed approximately 22 advanced classes in the area of drug distribution organizations and drug investigations all the way from the central intelligence agency down to the local police department level. (RP 121).

He discussed with the jury the difference in smell between marijuana that has been smoked and marijuana that is unburnt. He

indicated that they have very distinct odors which are not similar.

(RP 124 – 125).

He also discussed with the jury packaging of drugs.

(Detective Acee): I've also come across packaging material in the form of tin foil, card board boxes, various size zip lock baggies, garbage bags. I've seen some pretty elaborate packaging jobs where masking agents have been used to disguise the odor of the controlled substance from canine or human smell senses.

-(RP 129 L. 10 – 15).

The detective testified concerning the nature of the surveillance and how it began. They narrowed the area of surveillance to a duplex at 2612 Grand Boulevard, number B, Vancouver.

After watching it for some period of time, and seeing him at the location, we were able to kind of determine who was friendly and who wasn't. And by that I mean we were able to see the interactions with the various neighbors at this – at this duplex, to see which ones visited him and maybe were friends, and which ones weren't. Once we determined which neighbors did not appear to be friends with him, we went and interviewed those neighbors and showed them pictures, to verify that the person we were seeking actually lived there.

-(RP 134 L. 18 – 135 L. 3).

The person at that time that they were seeking was a person known to them as Jesus Gonzalez- Perez. The police considered

him to be at the top of the pyramid of distribution for the drugs.

During this part of the investigation the name of Renee Turner also came up. It was determined that there were a half a dozen cars parked in front of the duplex and the majority of those cars were registered to her as was the public utilities at that duplex and the telephone within the residence.

During the surveillance, they noted a large amount of foot traffic coming to the duplex.

(Detective Acee): The majority of visits to this location were very short in nature by that, I mean we timed them; the longest visit at this house was three and a half minutes, that a person visited there and then left. The shortest visit was just under a minute. I would characterize the majority of foot and vehicle traffic that we saw to this unit – this apartment number B – as being very - sporadic in terms of time. It wasn't always a set time. It was throughout the day, throughout the morning, throughout the evening. All of the visits were very short in nature.

A number of the individuals that would visit the location would either drive up or walk up. Once they were out in front of the location, they – I would observe them pull out a cell phone, call some unknown number; converse for just a few seconds, disconnect – or apparently disconnect, because they put the phone away; and then walk to the front door, where, a lot of times, without knocking, a person would open the door.

-(RP 137 L. 13 – 138 L. 6).

The Officer then observed the individuals that were living at the duplex move to another location. That location they moved to was 806 SE 141 Avenue, Vancouver. (RP 139 – 140).

The surveillance continued at the new residence. The detective gave an example of what occurred on October 2, over basically a three hour period of time.

Question (Deputy Prosecutor): OK, what did you observe during the three hours?

Answer (Detective Acee): I observed seven different subjects arrive at the location in seven different vehicles. There seem to be no connection with – the various people. With each arrival, a person would exit the vehicle and walk to the front door of the residence. Once at the door, the visitor would converse with an Hispanic male inside the location. I times the interactions at the front door. They lasted between one minute and three minutes. None of the subjects entered the residence. I was able to see specific hand to hand transfers to be what appeared to be currency, and that the person reached into their pocket, handed over a smaller object to a person inside the house and in return, the person inside the house gave either, again, a shoe box, approximately a foot by eight inches, or a black garbage bag to the various visitors. I saw – of the seven visitors, I saw six leave with either a shoe box or a bag.

-(RP 159 L. 11 – 160 L. 4).

Based on the observations, the detective submitted an affidavit and got a search warrant. They continued surveillance on the residence and then things, apparently, started to change in that

the items being taken from the residence in the plastic bags were of a much larger and bulkier size. (RP 164).

The defendant Eduardo Chavez Sanchez was also noted being there at the residence removing plastic bags.

(Detective Acee):..... at 0950 hours, Eduardo Chavez Sanchez arrived at the location, driving a burgundy Dodge Intrepid, not – the first one was a tan Dodge Intrepid; this car was a burgundy. Chavez Sanchez entered the residence and emerged 15 minutes later, carrying two large plastic bags, black – just like I described earlier, the garbage type bags. He placed those bags in the trunk of his vehicle, and left the location in a westerly direction.

-(RP 167 L. 1-9).

They attempted to tail the defendant's vehicle but they lost him in traffic (RP 167- 168). Later that morning (approximately 1148 hours) the officer's observed Mark Turner arrive at the location, driving a grey colored Buick Regal. The detective testified that Mr. Turner entered the residence, remained for about 35 minutes, and then left the residence carrying a large black plastic bag. He placed the bag in the backseat of his vehicle and then he retrieved two similar large black plastic bags from the trunk of his car. Those two bags contained empty soda cans and bottles and other recyclable materials. (RP 168-169).

The officer that stopped the vehicle being driven by Mr. Turner was Troy Rawlins, from the Vancouver Police Department. He testified that he followed the car, stopped it and found the black plastic bag with two smaller clear plastic bags that contained what appeared to be marijuana. (RP 278 – 297). It was later determined through testing that it was marijuana.

Shortly after Mr. Turner's vehicle left (approximately 1155 hours) at least two others arrived at the residence and exited the residence carrying large plastic bags. Surveillance was on one of the vehicles until it entered southern Portland and then they called the officer off. (RP 172 – 173).

The detective then saw the other defendant, Isidro Sanchez Valencia arrive at the residence at approximately 1330 hours. He went in the residence and came out carrying one large black plastic bag which he loaded into the back seat of a burgundy Isuzu Rodeo. At the time the officer knew him as Eugencio Gonzalez Sanchez. The officer identified him in Court as one of the defendant's (RP 173 – 174).

Later in the afternoon at about 3:00 p.m., Renee Turner and another individual left the residence. Ms. Turner was carrying an infant and the man with her was carrying two large black plastic

bags. (RP 174). Because all the large bags were being removed, the officer felt it incumbent to execute the search warrant because they were afraid that they were cleaning out the residence (RP 175).

The officer was also asked to describe the nature of the black bags that they were observing. He indicated as follows:

Answer (Detective Acee): Yes. I - - I observed the bags to be fairly light; and I'll - - my observations were based on the way in which people were carrying them out of the house. They carried them with relative ease. A couple of the guys actually slung it over their back just with a flick of the wrist. When Mark Turner came out, he was not carrying it in close to his body, like he - - he had to strain; he was just kind of carrying it, and the bag was swinging.

Each of the bags was only a quarter full to a third full, so they were relatively stout; but they did, again, appear to be light, based on the way that the bags were being carried.

Question (Deputy Prosecutor): Okay. And did the bags appear to contain items with sharp corners or pointed objects, or did they appear to be lumpy, from your perspective?

A: Lumpier in appearance.

Q: Okay. And no - - any sharp corners?

A: I didn't observe any sharp corners.

Q: Okay. Did they appear to contain any boxes?

A: No.

Q: Okay. And you were describing the way in which Mark Turner was carrying the black plastic bag. Do you have personal knowledge of Mark Turner's physical condition?

A: Yes.

Q: And please describe, for the jury, and how that's significant to the way he was carrying the bag.

A: Mark Turner normally has an oxygen mask strapped to his face, all the time: When he's driving, when he's walking. He suffers some type of illness. I know this because I've booked him into jail before, and - - and we had to get medical clearance.

That being said, he's usually - - I don't know how to describe it: Very slow in his movements. He appears to be in a weakened state, in that it takes extra time to load him into a car, and - - and we have to be a little bit more considerate of our movement of him.

Q: Okay. So he's - - Mark Turner is not a strong, strappy person?

A: No, sir.

Q: Okay. And the way in which he carried the black trash bag from the house, did he have any difficulty carrying it?

A: No.

Q: All right. And then you saw him load that bag into the vehicle, obviously.

A: Yes.

-(RP 176 L. 2 – 177 L. 24).

The search warrant was executed on the residence at 4:45 P.M. The officer noted that when first breaking the seal of the door and entering the residence there was "the very strong and distinct odor of fresh marijuana. It was – incredible. I mean, as soon as the door came open it was like it was just being sucked out of the house." (RP 180 L. 3 – 7). Once in the residence they walked from room to room making observations and notations and then also did the same thing out in the back yard where there was a shed. (RP 180).

Detective Acee testified that in bedroom number 2, inside a closet they found approximately 68 pounds of packaged marijuana in one pound packages. There was at least one digital scale there in the room and some other type of measuring device. (RP 187). In bedroom number 1, in the closet, they located a large shopping bag full of cash. The cash came out to roughly \$126,000.00. (RP 187). In bedroom number 3, they found a loaded handgun (RP 187). In the shed in the backyard they found two packaged bags of marijuana and "a shake net". The officer told the jury that a shake net is used to separate the marijuana bud from the loose stem and seeds. He also observed underneath the shake net a bunch of seeds and the loose particles of marijuana. He also observed out there that there was a larger scale (RP 188). In the residence itself they located unused samples of the black plastic bags, the large garbage size that the officer had described which were 50 gallon bags. He found a couple of boxes of those and some loose ones. He also found at least one box and a loose box of clear plastic bags, which was consistent with the type of bags that the marijuana itself was packaged in. (RP 189). Finally, they found prepaid cell phones and walkie talkies located in the residence (RP 194 – 195).

The officer described the use of the prepaid cell phones and the walkie talkies.

Question (Deputy Prosecutor): And how was that used?

Answer (Detective Acee): In my experience, those are used as a communication, a secure communication device between people. I have seen, in terms of drug trafficking, where the person's driving the load vehicle, or the vehicle that is loaded with narcotics, can call ahead and check in with scouts that are put out on the road ahead of time to look for police road blocks or police canine units, or just police cruisers in general; and they're also used to communicate to the driver of the load vehicle that it is safe, now, to come into the safe house and unload. Because the driver may be coming from as far away as California or Oregon and it needs to be communicated to them that it is safe to drive into the neighborhood, and go ahead and unload the vehicle.

-(RP 195 L. 7 - 22).

During the search of the residence, the officers found a receipt from a Best Western Inn in the name of Eduardo Sanchez. This item was found in the living room among some miscellaneous paperwork on the floor. (RP 198 – 199).

During the time that the officer's were in the residence, the various vehicles that had been seen leaving earlier were now coming back to the residence. Renee Turner and her male friend returned to the residence and were arrested. The defendant, Isidoro Sanchez-Valencia, also returned to the residence driving

the burgundy Isuzu Rodeo. He brought with him in the backseat Crystal Turner, Renee Turner's younger sister. (RP 204). Detective Acee testified that he searched the interior of the Isuzu Rodeo looking for evidence of the marijuana. The black bag was no longer there, but where it had been located in the backseat he could smell the odor of unburnt marijuana behind the driver's seat and in the carpet. (RP 205 – 206). The officer indicated, later in testimony, that the defendant originally identified himself to the officer as Eugenio Gonzalez-Sanchez. The officer testified that he was in court at a later occasion when the defendant identified himself as Isidoro Sanchez-Valencia. (RP 484 – 485).

The last person to return to the residence in a vehicle was the defendant Eduardo Chavez Sanchez. He returned in the burgundy Dodge Intrepid that he had left several hours earlier in. The detective indicated that he searched the interior of the vehicle again looking for the black bags. He didn't find any but he did detect the odor of unburnt marijuana inside the vehicle. Located in one of the pockets of his cargo type jeans was a wad of \$100 and \$50 dollar bills that was approximately 2 to 3 inches thick. He also had loose \$20's and a \$50 in another pocket. The count of the

money came to a little over \$8,500.00 which was wrapped up in the rubber band in the wad located in his pocket. (RP 209 – 210).

Detective Acee testified that approximately 68 pounds of marijuana would have a street value of approximately \$200,000.00. (RP 221). It is also of note that there was no drug paraphernalia or evidence of any marijuana smoking in the residence. (RP 241).

Finally, the detective was asked to summarize just what it was that was being looked at in this scenario from the point of view of his experience in the drug distribution trade. Part of his answer was as follows:

Answer (Detective Acee): Sure. In my experience, drug distribution organizations are set up very similar to legitimate business, in that there's a -- a pyramid-shaped structure, with a -- a boss at the top, that trickles down to various employees. And as you go down that structure, there's less and less responsibility.

In my experience, typically, especially in -- in marijuana cases like this, at the top of that structure would be the manufacturers -- or, in this case, because it's marijuana, the growers of the product itself -- itself. Once that product is -- is produced or harvested, it's turned over to multi-national cartels or distribution organizations.

From there, the distribution organizations employ a number of -- of brokers. And brokers represent a region. In this case, the broker in this investigation was Jesus Gonzalez-Perez; and he represented the southwest Washington area, distributing drugs in Cowlitz County, Clark County, and in the Portland area.

The various brokers represent the -- the geographical region, and they employ a number of managers. The managers, in my experience, are typically the guys that are responsible for the money collection.

They're the ones that carry guns. They're the ones that oversee the operation at the stash house, or the safe house, where the money's kept, or the drugs. Oftentimes it's been my experience that the drugs are kept at one location and the money at the other - - at - - at another; or they can be kept together.

The managers have the overall responsibility of the product and getting the money back to the broker, who then, in turn, shops it to wherever his boss is, in his chain of command.

The managers employ a number of runners or couriers. The couriers' responsibility is to take - - simply take the product from the safe house and deliver it to our neighborhood drug houses. They typically take a large bulk quantity; they don't break it down into small quantities. They take a bulk quantity, deliver it to the neighborhood drug house, and there, at the neighborhood drug house, it's further broken down into smaller quantities where vehicle and foot traffic can just approach the drug house and buy the drug qua- - - drug product.

Another important member in this structure is what I'll refer to as a "facilitator." In my experience, the facilitators in the drug trafficking organizations are a person that has a clean record. It's important that they have a clean record, because the vehicles are registered in their name, the public utilities, the telephone. Basically, all of the named documents, anything that has to have a person's name in it, this facilitator's name will be put on it; because if the police look at it, they've got a clean record, and they don't have a background in - - in criminal activity. In this case, I found Renee Turner to be that facilitator.

Question (Deputy Prosecutor): In your investigation, did Renee Turner have any criminal history?

A: No, she did not.

Q: And was the house in her name?

A: It was.

Q: Utilities?

A: The utilities were her - - in her name, as was the land line, the telephone - - the telephone in the house.

Q: Vehicles?

A: Five vehicles were registered in her name.

Q: And how old is Renee Turner?

A: I have to look at her date of birth; but she's in her young twenties. She has her first child, which is an - an infant. And by now, it's a few months old.

Q: Okay. And in your experience in investigating these types of distribution rings and organizations, how is this scenario in the scheme of where it falls? I.e., is it at the street level? Is it at the manufacturer level? Is it somewhere in between? Based on your experience, where would you classify this operation?

A: This is a safe house. This is where the marijuana comes in out of the grow locations. It's transported to this location. It's dried in the shed. It's then brought into the house and packaged into one-pound increments. And the managers - - my investigation identified Alberto and Loreano as the managers - - they then employed a number of couriers that took bulk marijuana from this location, - - this same marijuana that we observed during our surveillance leaving in the garbage bags - - out to the neighborhood drug houses in our community.

Mr. Bailes: Objection, Your Honor. He's testifying, again, to something that there's no foundation. He never saw any marijuana leave the house.

The Court: Let's clarify, then, in terms of what he's testifying to, and from his, then experience, on what he's observed in this case.

Mr. Vu: Yes, Your Honor. And I can direct the witness to answer as to what he believed he saw, based on his experience, Your Honor.

The Court: Okay.

Q (by Mr. Vu): Is that clear, officer?

A: Yes, sir.

Q: Okay. So would you like to rephrase your answer?

A: Yes. This house - - based on my experience, I recognized it to be a stash house: Again, where unpackaged raw product, in this case marijuana, arrived at the location; was subsequently packaged for further distribution in large quantities, and then sent out to further distribution locations.

Q: Okay. And in your experience, how is the money collected? Is it, as you - - as the product is being exchanged? Or is it a credit-type scenario, or is it a person that goes around picking up the money? How is it done?

A: In my experience, the managers collect the money. The - - the various drug couriers or runners are the lowest level on the tier. They just drop the product off. Rarely do they collect the money. That's solely the manager's job. The manager's responsible for the money collection. And in my experience, the manager is almost always armed, or has proximity or access to a firearm.

-(RP 213 L. 9 – 218 L. 5).

In a claim of insufficient evidence, a reviewing court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). The Appellate Court will defer to the trier of fact for purposes of resolving conflicting testimony and evaluating persuasiveness of the evidence. Put another way, credibility determinations are for the trier of fact and not subject to review. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Finally, the reviewing court need not be convinced of a defendant's guilty beyond a reasonable doubt, only that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

The trial court instructed the jury on the elements of the crimes charged. (CP 75; 39).

Concerning the crime of Possession with Intent to Deliver a

Controlled Substance, Marijuana, the State had to prove:

(1) that on or about the 21st day of October, 2006, the defendant possessed a controlled substance;

(2) that the defendant possessed the substance with intent to deliver a controlled substance;

(3), and that the acts occurred in the State of Washington.

(RP 597).

To convict a defendant of the crime of Conspiracy to Commit

Possession of a Controlled Substance with Intent to Deliver

Marijuana, the State had to prove:

(1) that on or about the 21st day of October, 2006, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of Possession of a Controlled Substance with Intent to Deliver Marijuana;

(2) that the defendant made the agreement with the intent that such conduct be performed;

(3) that any one of the persons involved in the agreement took a substantial step in pursuance of the agreement;

(4) and that the acts occurred in the State of Washington.

(RP 599).

The State submits that there has been adequate information provided to the jury in the form of direct and circumstantial evidence to tie both defendants' to a drug distribution ring operating in Clark

County. The large amount of foot traffic that had been documented over the time of the surveillance at both the duplex and then after the move, to the residence, clearly indicate that some type of quick activities were taking place. Further, the large amount of marijuana and the large amount of cash that was recovered from the residence together with the strong odors of unburnt marijuana would obviously indicate that this residence was being used for purposes of drying and distribution of the narcotic. One of the defendant's gave a fake name to the officers' at the time that he was arrested, one of them had over \$8500.00 in cash on his person and both vehicles when they returned smelled of unburnt marijuana. This was a sophisticated distribution operation. It contained many levels of sophistication. The least sophisticated members of this distribution ring were the runners which apparently included both of these defendant's. The State submits that there is adequate information to allow this to go to the jury. When the evidence is reviewed in a light most favorable to the State and circumstantial evidence is also included, it is clear that there has been an adequate showing by the State. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

III. RESPONSE TO ASSIGNMENT OF ERROR- COMMUNITY CUSTODY CONDITION

The second and third assignments of error deal specifically with a provision in the Judgment and Sentences (CP 132,137) which indicates as follows:

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

-(Judgment and Sentences, CP 132,137, page 8)

The defendants maintain that this particular provision of the sentence is "hopelessly vague". Further, they maintain that this matter should be heard at this time and is ripe for decision.

A statute or condition is void of vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The Appellate Court presumes that statutes are constitutional and the defendant has a heavy burden of proving that a statute is unconstitutional beyond a reasonable doubt. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). The fact that some terms in a

statute are not defined does not necessarily mean the statute or condition is void for vagueness. Douglass, 115 Wn.2d at 180. Impossible standards of specificity are not required, and a statute “is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988).

The State submits that this identical argument and claim was raised recently in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007). In the Motter case, the defendant challenged the identical provision of his judgment and sentence. He attacked it for vagueness and for the reasons also raised in this appeal. Division II, in the Motter case, indicated as follows:

B. Prohibition on Paraphernalia Possession and Use

Second, Motter challenges the trial court's order that he: 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 and data storage devices. CP at 149. This condition does not order affirmative conduct. And, as demonstrated above, Motter's crime was related to his substance abuse. Thus, forbidding Motter from possessing or using controlled substance paraphernalia is

a "crime-related prohibition" authorized under RCW 9.94A.700(5)(e). Thus, this condition is valid.

Motter argues that "almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils." Br. of Appellant at 29. A community custody condition may be void for vagueness if it fails to define specifically the activity that it prohibits. State v. Riles, 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998). But Motter fails to cite to authority and his argument consists of one unhelpful sentence in the context of a complex constitutional legal doctrine.

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.

The State submits that nothing has been added in this brief to undermine that Motter determination.

Finally, the defendants maintain that under the WAC provisions that this matter would not come back before the court nor would there be an opportunity for review of the conditions once they do become "ripe". However, the State would submit that since this matter is not ripe at this time, that when it becomes ripe, the defendants would have the opportunity to file a personal restraint petition to seek some type of other relief at that time. It would not make any sense to forestall them at that point from raising it.

A petitioner who has had no previous or alternative avenue for obtaining state judicial review need only satisfy the requirements under RAP 16.4. E.g., In Re Personal Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994) (a personal restraint petition (PRP) challenging a decision of the Indeterminate Sentence Review Board concerning parole need not meet the threshold requirements for constitutional and nonconstitutional errors because the policy of finality underlying those requirements is absent where the prisoner has had no previous or alternative avenue for obtaining state judicial review of the board decision); see also In Re Personal Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995); In Re Personal Restraint of Mattson, 124 Wn. App. 130, 172 P.3d 719 (2007).

Personal restraint petitions are not a substitute for direct review. Petitioners challenging a court judgment and sentence must do more than show legal error; they must either show constitutional error that caused actual and substantial prejudice or nonconstitutional error that inherently caused a complete miscarriage of justice. In Re Personal Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (quoting In Re Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)). But when, as here, direct review is not available, we apply a more lenient standard. Dalluge can prevail if he can show he is under “unlawful” (as meant by RAP 16.4(c)) “restraint” (as meant in RAP 16.4(b)). In Re Personal Restraint of Isadore, 151 Wn.2d 294, 299, 88 P.3d 390 (2004) (citing In Re Personal Restraint of Garcia, 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001)). Petitioners are restrained if, among other things, they are confined or are “under some other disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b); see also In Re Personal Restraint of Cashaw, 123 Wn.2d 138, 149, 866 P.2d 8 (1994).

- (In Re Personal Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008))

The State submits that Motter is the controlling case law and should be applied in this circumstance.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 25 day of April, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNE, WSBA#7869
Senior Deputy Prosecuting Attorney

