

No. 95734-7

NO. 75458-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD R. BROWN,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

(1) At the original sentencing, the court imposed a standard-range sentencing totaling 638 months. After remand, the court imposed an exceptional sentence totaling 399 months. Does this reduction of the sentence create a presumption that the court was retaliating against the defendant for exercising his right to appeal?

(2) After remand, the prosecutor recommended imposition of the same total sentence that she originally recommended. Does this recommendation give rise to a presumption of vindictiveness?

(3) At the original sentencing, the court determined that a standard-range sentence of 638 months was adequate punishment for the defendant's crimes. At re-sentencing, the court determined that a standard-range sentence of 351 months would be inadequate. Did these two determinations involve identical issues, so as to bar the second determination under principles of collateral estoppel?

(4) At the original sentencing, the trial court counted prior convictions towards the defendant's offender score. On appeal, the defendant did not challenge that computation. Can this challenge be raised for the first time on a second appeal?

(5) If the challenge can be raised, was the criminal history adequately proved by a sworn certification that the convictions appeared in certain specified official databases?

(6) At the original sentencing, the court found that the crimes were not related to substance abuse. On remand, was the court authorized to impose substance abuse treatment conditions?

## **II. STATEMENT OF THE CASE**

On December 1, 2011, the defendant, Ronald Brown, along with accomplices, entered the home of Louis and Susan Munson. They threatened the Munsons with guns and took several items of personal property. As a result, they were convicted of seven counts: two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree burglary, and two counts of second degree assault. All of these crimes had firearm enhancements. 1 CP 59-65.

Because first degree kidnapping is a serious violent offense, the defendant was subject to the sentencing rules set out in RCW 9.94A.589(1)(b). Under those rules, the court determined the sentence for one count of kidnapping using the defendant's prior criminal history and all other current offenses that were not serious violent offenses (i.e., all of the non-kidnapping offenses). The

sentence for the other count of kidnapping was computed using an offender score of 0. These two counts were run consecutively. All other sentences were computed in the usual way, using all current and prior convictions, and run concurrently. 3/12/13 RP 12-14. All weapon enhancements were run consecutively. RCW 9.94A.533(3)(e).

The defendant had seven prior convictions for non-felony offenses. Counting these, the court computed offender scores of 17 for one count of first degree kidnapping, 0 for the other kidnapping count, and 19 for each remaining count. 1 CP 90. The court imposed sentences at the top of the standard ranges. 3/12/13 RP 21-23. The resulting sentences are shown by the following table:

Count	Charge	Base Sentence	Enhancement	Total
1	Kidnapping 1°	198 (cons. to count 2)	60	258
2	Kidnapping 1°	68 (cons. to count 1)	60	258
3	Robbery 1°	171	60	231
4	Robbery 1°	171	60	231
5	Burglary 1°	116	60	176
6	Assault 2°	84	36	120
7	Assault 2°	84	36	120
<b>Total</b>	---	<b>266</b> (198+68)	<b>372</b>	<b>638</b>

1 CP 93.

On appeal, this court determined that the "to convict" instructions for the kidnapping counts included an uncharged alternative. 1 CP 65-67. It also determined that the two assault counts merged with the robberies. 1 CP 70-75. It therefore reversed the kidnapping counts and remanded for re-trial. It also directed vacation of the assault convictions and resentencing. 1 CP 87-88.

On remand, the State decided not to re-try the defendant for the two kidnapping counts. 6/21/16 RP 3-4. The defendant was therefore re-sentenced for only three counts: two counts of first degree robbery, and one count of first degree burglary (all with firearm enhancements). Because none of these are serious violent offenses, ordinary scoring rules apply. The State recommended that the court impose an exceptional sentence equal to the original 638 months. 6/12/16 RP 19-26; 1 CP 32-36.

The court rejected this recommendation. Instead, it imposed an exceptional sentence totaling 399 months. The court exceeded the standard range on individual counts, but it kept the base sentences concurrent. The enhancements were still consecutive. The resulting sentence is shown by the following table:

1	Dismissed	---	---	---
2	Dismissed	---	---	---
3	Robbery 1°	219	60	279
4	Robbery 1°	219	60	279
5	Burglary 1°	144	60	204
6	Dismissed	---	---	---
7	Dismissed	---	---	---
<b>Total</b>	<b>---</b>	<b>219</b>	<b>180</b>	<b>399</b>

1 CP 11. The defendant has appealed this sentence.<sup>1</sup> 1 CP 1-2.

### **III. ARGUMENT**

#### **A. IMPOSING A LOWER SENTENCE AFTER REMAND DOES NOT CREATE A PRESUMPTION OF JUDICIAL VINDICTIVENESS.**

The trial court reduced the defendant's sentence from 638 months to 399 months – a reduction of almost 20 years. The defendant nonetheless claims that this sentence was vindictive.

The U.S. Supreme Court has held that increased punishment cannot be imposed for the purpose of punishing a successful appeal. To ensure the absence of this motivation, any increase in the punishment must be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." North Carolina v. Pearce, 395 U.S. 711, 726, 89 S.Ct. 2072, 23

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<sup>1</sup> He has also filed a personal restraint petition challenging the conviction, no. 76394-6-1.

L.Ed.2d 656 (1969). This requirement only applies under circumstances that give rise to “a reasonable likelihood that the increase in sentence is the product of actual vindictiveness.” Alabama v. Smith, 490 U.S. 794, 799, 104 L.Ed.2d 865, 109 S.Ct. 2201 (1989).

The Pearce presumption only applies when a sentence is increased. If the defendant was sentenced on multiple counts, there must be an increase in the aggregate sentence, not just the sentence on an individual count. State v. Larson, 56 Wn. App. 323, 328, 783 P.2d 1093 (1989). Larson followed the rule in federal courts, which “uniformly hold that the Pearce presumption never arises when the *aggregate* period of incarceration remains the same or is reduced on remand.” Id. at 326 (court’s emphasis). In support of this statement, Larson cited nine federal appellate decisions. Id. at 326-27. Subsequent federal cases have held the same. See, e.g., United States v. Nerius, 824 F.2d 29 (3<sup>rd</sup> Cir. 2016) (re-sentencing at top end of guidelines range was not vindictive, even though original sentence was at bottom end of a higher range); United States v. Horob, 735 F.3d 866 (9<sup>th</sup> Cir. 2013) (not vindictive to increase sentence on one count, following dismissal of other counts, when total sentence remained the same).

The Ninth Circuit Court of Appeals has explained the reason for this rule:

[The defendant] is understandably disappointed that his successful appeal on two counts did not result in a reduction in his final sentence, but this does not give rise to a presumption of vindictiveness. This rule is intended to ensure that the right of the defendant to appeal will not be chilled by the possibility of a longer sentence on remand, as well as to guard against the danger that the State might be retaliating against the accused for lawfully attacking his conviction. To this end, the law mandates that a defendant may not be penalized by the imposition of a harsher sentence based on his exercise of his right to appeal and his successfully obtaining a remand. The fact that a defendant's sentence remains the same, even when the count dismissed carried a mandatory sentence, does not create a chilling effect. If there is a possibility of a sentence reduction and no risk of a sentence increase, defendants will continue to appeal.

Horob, 735 F.3d at 870-71 (citations omitted).

The defendant cites State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003). That case did not involve any issue of aggregate sentences. The defendant there was convicted of a single count. After initially imposing a standard-range sentence of 164 months, the court re-sentenced the defendant to 240 months. This court held that the new sentence was presumptively vindictive under Pearce. There is no conflict between that holding and Larson or the federal cases.

The defendant cites only one case to the contrary: In re Craig, 571 N.E.2d 1326 (Ind. App. 1991). That case involved a summary adjudication for contempt. The trial court initially found that the defendant had committed three acts of contempt. It sentenced him to 90 days for each act, for a total of 270 days. On appeal, the appellate court found that the defendant's conduct constituted only a single act of contempt. The trial court then re-sentenced him to 270 days for that single act. On a second appeal, the Indiana Court of Appeals held that this sentence was presumptively vindictive.

Although Craig has not been explicitly overruled, its holding has been repudiated. The Indiana Court of Appeals has "joined with that vast majority of courts who have addressed the question and have concluded that it is the aggregate sentence that is the key in such cases." Sanjari v. State, 981 N.E.2d 578, 582 (Ind. App. 2013). In Sanjari, the defendant was initially convicted of two class C felonies. The court sentenced him to five years' incarceration on each count, to be served consecutively for a total of 10 years. On appeal, one of the convictions was reduced to a class D felony. The trial court then re-sentenced the defendant to eight years'

incarceration for the class C felony and two years for the class D felony, which again totaled 10 years.

The Indiana Court of Appeals held that the increased sentence was not vindictive. The sentencing court was entitled to view the individual sentences as part of an overall plan. On remand, the trial court was entitled to flexibility in sentencing, so long as the aggregate sentence is no longer than originally imposed. Id. at 583. Thus, the rule in Indiana is now the same as the rule in Washington and most other jurisdictions.

This court should continue to follow the rule set out in Larson. On remand, a sentencing court can increase the sentence on individual counts, so long as the aggregate sentence is not increased. No special factual justification is needed to allow this. Here, the sentencing court did not increase the sentence. Rather, the sentence was substantially reduced. The new sentence does not give rise to any presumption of vindictiveness.

The defendant seeks to rely on State v. Bradley, 281 Ore. App. 696, 383 P.3d 937 (2016). There, some of the defendant's convictions were reversed on appeal. On remand, the trial court re-imposed the same total sentence. In doing so, however, the court expressly took into account the counts that had been reversed. Id.

at 703, 383 P.3d at 941. The Oregon Court of Appeals held that because the total sentence was the same, there was no *presumption* of vindictiveness. Id. at 701, 383 P.3d at 940. The sentencing court's remarks, however, indicated *actual* vindictiveness. The case was therefore remanded for re-sentencing. Id. at 703-04, 383 P.3d at 941.

Nothing comparable occurred in the present case. Here, the trial court used a mathematical formula in computing the sentence on remand. It extrapolated the guideline sentence from the top end of the sentencing grid (representing an offender score of 9) to the defendant's actual offender score of 11. 6/21/16 RP at 35. This computation did not take into account any of the reversed convictions, which of course did not count towards the offender score. It yielded a sentence based solely on the defendant's prior criminal history and the three convictions that were affirmed. The sentence imposed by the trial court reflects neither presumed nor actual vindictiveness.

**B. AFTER A CASE IS REMANDED FOR RE-SENTENCING, A PROSECUTOR CAN PROPERLY RECOMMEND IMPOSITION OF A LAWFUL SENTENCE.**

The defendant also claims that the prosecutor's sentencing *recommendation* was presumptively vindictive. The prosecutor's

recommendation on remand was for the *same* sentence that the prosecutor originally recommended – a total of 638 months. 3/12/13 RP 12-16; 6/12/16 RP 25. For much the same reasons as already discussed, recommending the same sentence does not indicate vindictiveness.

Constitutional due process principles prohibit prosecutorial vindictiveness. Prosecutorial vindictiveness occurs when the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. Thus, a prosecutorial action is "vindictive" only if *designed* to penalize a defendant for invoking legally protected rights.

State v. Korum, 157 Wn.2d 614, 627 ¶ 16, 141 P.3d 13 (2006) (court's emphasis, citations omitted). "A presumption of vindictiveness arises when a defendant can prove that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness." Id. ¶ 17.

Here, there is nothing about the prosecutor's recommendation that indicates that it was *designed* to penalize the defendant for exercising his right to appeal. At most, following the recommendation would have prevented the defendant from receiving his hoped-for sentence reduction. Failing to obtain a benefit, however, does not create the "chilling effect" that could

result from an increase in the defendant's sentence. Horob, 735 F.3d at 871.

Most of the cases where prosecutorial vindictiveness has been found involve filing additional charges. See, e.g., Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (filing additional charges after request for trial de novo); United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976) (filing additional charges after refusal to agree to trial before magistrate); In re Bower, 38 Cal. 3d 865, 700 P.2d 1269, 215 Cal. Rptr. 267 (1985) (seeking conviction for first degree murder after defendant obtained mistrial on charge of second degree murder); but see Korum, 157 Wn.2d at 627-36 ¶¶ 16-32 (no vindictiveness in adding additional charges after defendant withdrew guilty plea). The defendant cites no cases where vindictiveness was found (or even argued) based on a sentencing recommendation. If a court can lawfully impose a particular sentence, there is no apparent reason why a prosecutor should be barred from recommending that sentence (absent, of course, some binding agreement to the contrary). The prosecutor's recommendation of the *same* sentence after remand does not give rise to a presumption of vindictiveness.

**C. BECAUSE THE TRIAL COURT'S DISCRETIONARY SENTENCING DECISION INVOLVED DIFFERENT ISSUES ON REMAND THAT IT DID AT THE ORIGINAL SENTENCING, COLLATERAL ESTOPPEL DOES NOT BAR THE NEW SENTENCE.**

The defendant argues that the trial court was collaterally estopped from imposing an exceptional sentence on remand.

The doctrine of collateral estoppel is embodied in the Fifth Amendment to the United States Constitution guaranty against double jeopardy. Collateral estoppel (or issue preclusion) means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. This court has long recognized that collateral estoppel applies in criminal cases. Washington courts have adopted the perspective of federal decisions that collateral estoppel in criminal cases is not to be applied with a hypertechnical approach but with realism and rationality.

Before collateral estoppel is applied, affirmative answers must be given to each of the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

State v. Tili, 148 Wn.2d 350, 360–61, 60 P.3d 1192 (2003) (citations omitted) (plurality op.); see id. at 376-77 (Madsen, J., concurring with this portion of plurality decision).

In the present case, the critical issue is the first question – whether the issues in the two proceedings were identical. In analyzing this question the nature of the sentencing decision should be borne in mind.

[T]he imposition of an exceptional sentence involves two steps. First, a jury makes a factual determination beyond a reasonable doubt that facts exist to support an exceptional sentence. Second, a judge exercises his or her discretion to determine, given the aggravating facts, whether an exceptional sentence is warranted and, if so, its length.

State v. Rowland, 160 Wn. App. 316, 330 ¶ 22, 249 P.3d 635 (2011), aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012) (citations omitted).

The situation in the present case is slightly different, because no jury finding was necessary. The judge relied on the “free crimes” aggravating factor set out in RCW 9.94A.535(2)(c):

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

Because this factor rests solely on criminal history and the jury's verdict on the current convictions, imposition of an

exceptional sentence does not require a jury. State v. Alvarado, 164 Wn.2d 556, 566 ¶ 21, 192 P.3d 345 (2008). This does not, however, change the fundamental nature of the court's decision. It still comprises two parts: (1) a factual decision whether the defendant's high offender score results in some of the current offenses going unpunished, and (2) a discretionary decision whether, in light of that factor, an exceptional sentence is warranted.

Here, the trial court expressly found at the original sentencing that there were valid legal grounds for imposing an exceptional sentence. As a matter of discretion, the court chose not to do so. 3/12/13 RP 21. Thus, on the first part of the analysis – the factual determination – the original decision was *against* the defendant. Imposing an exceptional sentence on re-sentencing did not involve any change to that determination.

With respect to the second part of the analysis – the discretionary decision -- the issue had significantly changed by the time of the second sentencing. At the first sentencing, the top end of the standard sentence range totaled 638 months. The discretionary issue before the court was: "Is 638 months' confinement adequate punishment for the defendant's crimes?" By

the time of the second sentencing, however, the dismissal of four charges had reduced the top end of the standard sentence range to a total of 351 months. The discretionary issue before the court was whether this lesser sentence was adequate punishment. Obviously that is not the same issue. When the issue decided at the prior proceeding was not identical, collateral estoppel has no application.

The defendant's argument takes the simplistic approach of treating imposition of an exceptional sentence as a unitary decision. He thus claims that an initial decision not to impose an exceptional sentence forecloses a later decision to impose such a sentence – regardless of intervening changes in the sentence range. Tilli clearly rejects such an argument. There, the sentencing court initially held that three rape convictions did not constitute the same criminal conduct. It imposed a standard-range sentence. The Supreme Court then held that these crimes did constitute the same criminal conduct. On remand, the sentencing court imposed an exceptional sentence. The Supreme Court upheld that sentence:

The trial court, having decided that it would sentence [the defendant] as though the rape counts were separate and distinct, considered and rejected imposing an exceptional sentence on top of the presumptive sentence, which the judge considered to be fair by reason of the consecutive sentencing that occurs in the separate and distinct context. When we

determined that [the defendant's] rape counts were to be sentenced as same criminal conduct in [the first appeal], and we remanded for resentencing in accordance with that determination, the trial court was faced with a different sentencing context. At that point, the sentences for each rape count were to be served concurrently. This results in a sentence for the rape counts that is significantly reduced compared to that which resulted at the first sentencing and one that the trial judge perceived to be too lenient. Thus, the issue at the resentencing was fundamentally different. At the first sentencing, the trial court considered and declined to impose an exceptional sentence on top of the presumptive sentence resulting from separate and distinct conduct and consecutive sentences. Upon resentencing, the trial court was deciding whether to impose an exceptional sentence on top of the presumptive sentence resulting from same criminal conduct. For this reason, we answer the first question of the collateral estoppel analysis in the negative. There being no identity of the issues, the trial court was not collaterally estopped from imposing an exceptional sentence at the resentencing.

Tilli, 148 Wn.2d at 362–63.

The situation in the present case is fundamentally the same. At the first sentencing, the trial court was faced with a standard sentencing range that the trial court considered to be fair because of the consecutive sentences for multiple serious violent offenses. The court considered that sentence “sufficient in relation to the crimes that were committed.” 6/21/16 RP 34. By the second sentencing, that aspect of the sentence had been eliminated because of the dismissal of the first degree assault counts. The

court was then faced with a greatly-reduced standard range, which the court considered "no longer appropriate." Id. Since the issue at the second sentencing was not the same as the issue at the first sentencing, there is no basis for collateral estoppel.

The defendant places heavy reliance on the discussion of collateral estoppel in the lead opinion in State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992). That opinion was signed by only four justices. A concurring opinion, signed by an equal number of justices, would not have reached this issue. Id. at 669-70 (Durham, J., concurring). "When no rationale for a decision of an appellate court receives a clear majority, the holding of the court is the position taken by those concurring on the narrowest grounds." Rash v. Providence Health & Services, 183 Wn. App. 612, 635 ¶ 55, 334 P.3d 1154 (2014), review denied, 182 Wn.2d 1028 (2015). In Collicott, the narrower position is set out in Justice Durham's concurrence. That opinion, not the lead opinion, sets out the holding of the court.

Even if the lead opinion were applied, it would not require a different result. At the initial sentencing there, the trial court apparently rejected a claim that the defendant's actions were deliberately cruel. At a re-sentencing, however, the court found

deliberately cruelty. Collicott, 118 Wn.2d at 661. If the court's initial decision rested on a factual determination that deliberate cruelty had not been proved, then the issue at re-sentencing was the same. The reasoning of the Collicott lead opinion has no application when the trial court's decision was based on discretionary rather than factual considerations, as in Tili and the present case. An exceptional sentence was not barred by collateral estoppel.

**D. THE TRIAL COURT PROPERLY COUNTED THE DEFENDANT'S PRIOR CONVICTIONS TOWARDS HIS OFFENDER SCORE.**

**1. A Challenge To The Defendant's Criminal History Cannot Be Raised For The First Time On A Second Appeal.**

The defendant claims that his prior convictions should not have counted towards the offender score, because the State failed to prove that they did not "wash out." At the original sentencing, the trial court counted the same prior convictions. Compare 1 CP 90 with 1 CP 7. This computation was not challenged on the first appeal. Nor was any challenge raised at remand. 6/21/16 RP 29-30. The issue cannot be raised for the first time on a second appeal.

Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where ... the issues could have been raised on

the first appeal, we hold they may not be raised in a second appeal.

The defendant's remedy under such circumstances is via personal restraint petition.<sup>2</sup> State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); see State v. Fort, 190 Wn. App. 202, 228-29 ¶ 59, 360 P.3d 820 (2015), review denied, 185 Wn.2d 1011 (2016).

There is every reason to apply the rule in the present case. The defendant had two separate opportunities to challenge the existence of the misdemeanor convictions that prevent "wash out." His failure to do so most likely stems from a recognition that they exist. If that is not the case, he can establish the fact via personal restraint petition. It would be an great waste of judicial resources to remand this case for a third sentencing proceeding, for determination of facts that are most likely not in genuine dispute. The court should refuse to consider the defendant's challenge to the offender score.

**2. If The Issue Can Be Raised, The Defendant's Criminal History Was Adequately Proved By A Sworn Certification That The Listed Convictions Appeared In Certain Specified Official Databases.**

If the issue is considered on the merits, it should be rejected. Contrary to the defendant's claims, the existence of the

misdemeanor convictions does not rest on "bare assertions."  
Rather, the list of the defendant's convictions carried a sworn  
certification:

I am a legal specialist employed by the Snohomish  
County Prosecutor's Office, and make this affidavit in  
that capacity. I have reviewed the following databases  
maintained by federal and state agencies to  
determine the above named defendant's criminal  
history: NCIC (maintained by the FBI), WWCIC  
(Washington State Patrol Criminal History Section),  
JIS (Judicial Information System), DOL (Washington  
State Department of Licensing), DOC (Washington  
State Department of Corrections) A review of those  
sources indicates the defendant's criminal history is  
as listed above.

I certify (or declare) under penalty of perjury under the  
laws of the State of Washington that the foregoing is  
true and correct.

/s/ Dave H. Wold  
paralegal

DATED this 16<sup>th</sup> day of June, 2016, at the Snohomish  
County Prosecutor's Office

1 CP 44.

As the defendant points out, proof of criminal history cannot  
rest on "[b]are assertions, unsupported by evidence." Rather, "the  
State must at least introduce evidence of some kind to support the  
alleged criminal history." State v. Hunley, 175 Wn.2d 901, 910 ¶ 14,

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<sup>2</sup> The defendant's personal restraint petition does not raise  
this issue.

287 P.2d 584 (2012). That occurred in the present case. The State presented a sworn declaration that the listed convictions appeared in certain specified databases. If the defendant nonetheless maintained that the convictions did not exist, he could have objected and offered evidence to that effect. Absent any challenge, the trial court could properly rely on this sworn certification to establish the defendant's criminal history. The offender score was properly computed.

**E. IN VIEW OF THE COURT'S ORIGINAL FINDING THAT THE DEFENDANT'S CRIMES WERE NOT RELATED TO CHEMICAL DEPENDENCY, THE STATE CONCEDES THAT THE TRIAL COURT ERRED IN IMPOSING DRUG TREATMENT CONDITIONS.**

Finally, the defendant challenges several conditions of community custody. RCW 9.94A.703(3)(f) allows the court to require a defendant to "[c]omply with any crime-related prohibitions." The defendant points out that at the original sentencing, the court expressly declined to find that "these crimes were committed as a result of your chemical dependency issue." 3/12/13 RP 23. The State agrees that there was no basis for reconsidering this factual finding. As a result, the conditions relating to substance abuse should be stricken. This specifically applies to the following two conditions: # 5 ("Do not possess drug

paraphernalia) and # 8 ("Participate in substance abuse treatment as defined in writing by your supervising Community Corrections Officer"). It also applies to the underlined portion of # 7 ("Participate in offense related counseling programs, to include substance abuse/chemical dependency treatment and Department of Corrections sponsored offender groups, as directed by the Supervising Community Corrections Officer"). The balance of Condition # 7 is crime-related and should be upheld.

The defendant challenges condition # 6 ("You must stay out of drug areas as defined in writing by your supervising Community Corrections Officer"). RCW 9.94A.703(3)(a) allows a court to order an offender to "[r]emain within, or outside of, a specified geographical boundary." There is no specific requirement that such requirements be "crime related." The State concedes, however, that the reference to "drug areas" is unconstitutionally vague. See State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015) (reference to "areas where minor children are known to congregate" is unconstitutionally vague). Possibly the court meant to refer to "protected against drug trafficking areas," which are defined by RCW 10.66.010(5). That term is, however, not necessarily

synonymous with “drug areas.” This requirement should be either clarified or stricken.

The defendant also challenges condition # 9 (“Participate in urinalysis, Breathalyzer, and compliance polygraph examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody”). The court is authorized to impose “crime related prohibitions.” RCW 9.94A.703(3)(f). That term includes “affirmative acts necessary to monitor compliance with the order of a court.” RCW 9.94A.030(10); see State v. Riles, 135 Wn.2d 326, 341-42, 957 P.2d 655 (1998). Each part of condition # 9 relates to compliance with an unchallenged condition. Urinalysis could detect violation of condition # 3 (“Do not possess or consume controlled substances unless you have a legally issued prescription”). Breathalyzer testing could detect violation of condition # 2 (“Do not possess or consume alcohol”). Polygraph examinations could detect violation of any of the conditions. Consequently, all portions of condition # 9 are valid.

The defendant also claims that the imposition of community custody decisions exceeded this court’s mandate. In its opinion, the court remanded the case for “resentencing.” 1 CP 88. The court did not direct merely modification of the terms of confinement – it

directed resentencing. Imposition of conditions of community custody is a necessary part of sentencing. RCW 9.94A.703. To the extent that the conditions fell within the trial court's statutory authority, the court acted properly in imposing them.

#### **IV. CONCLUSION**

This case should be remanded with instructions to strike or modify community custody conditions 5, 6, 7, and 8. In all other respects, the judgment and sentence should be affirmed.

Respectfully submitted on May 31, 2017.

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

THE STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Appellant.

No. 75458-1-1

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of June, 2017, at the Snohomish County Office.



Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

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