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NO. 66300-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISAIAS PERALTA-REYES,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUE PRESENTED

Whether the trial court properly exercised its statutory authority when ordering conditions of community custody.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Peralta-Reyes with two counts of child molestation in the second degree -- domestic violence, and one count of tampering with a witness for abusing and attempting to prevent the truthful testimony of his stepdaughter, K.L. CP 1-6. Peralta-Reyes waived his right to an attorney and his right to a jury trial, and he represented himself at a bench trial before the Honorable Bruce Heller. CP 7.

The trial court found Peralta-Reyes guilty of all three counts as charged. CP 20-25. The trial court imposed a standard-range sentence, which included 36 months of community custody. CP 9-19. Peralta-Reyes now appeals. CP 35.

2. SUBSTANTIVE FACTS

As the trial court found based on the testimony presented at trial, Peralta-Reyes sexually assaulted his stepdaughter, K.L., on

two occasions in August 2009 by squeezing and fondling her breasts for several minutes while they were both sitting on the couch at home. CP 21. K.L. reported this conduct to a woman at church; this woman then reported the allegations to one of the pastors, and the pastor called the Federal Way Police. CP 21. After Peralta-Reyes was arrested and advised of his rights, he told the police that K.L. was telling the truth when she said he had squeezed and fondled her breasts, and that it had happened more than once. CP 21-22. Peralta-Reyes tearfully admitted to the police he had touched K.L. for sexual reasons, and he apologized. CP 22.

After Peralta-Reyes was booked into jail, he called K.L.'s mother and told her not to come to court, and he told her to tell K.L. that she should say that the allegations against him were false. CP 23. Although K.L. wrote two letters recanting the allegations, both of which the trial court found not to be credible, K.L. testified truthfully at trial about what Peralta-Reyes had done. CP 23.

C. ARGUMENT

THE CONDITIONS OF COMMUNITY CUSTODY ARE PROPER, AND MERELY AUTHORIZE THE TREATMENT PROVIDER TO EXERCISE DISCRETION.

Peralta-Reyes challenges two of the conditions of community custody that were imposed by the trial court. More specifically, Peralta-Reyes challenges the following conditions: 1) that he is not allowed to purchase or possess alcohol if his sexual deviancy treatment provider requires abstinence; and 2) that he is not to possess or peruse sexually explicit materials as defined by his sexual deviancy treatment provider. See Brief of Appellant; CP 17-18. These claims should be rejected because both conditions are valid as written.

First, Peralta-Reyes claims that although the trial court had statutory authority to prohibit his use of alcohol, the trial court acted without statutory authority in prohibiting him from purchasing or possessing alcohol. Brief of Appellant, at 5-7. Although this claim would be meritorious in other circumstances,¹ such is not the case here because the trial court's order is conditional. More specifically, the trial court prohibited the possession or purchasing of alcohol "if

¹ See State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003).

treatment provider requires abstinence." CP 18. Therefore, this condition applies only if the sexual deviancy treatment provider decides that it is a necessary component of Peralta-Reyes's sexual deviancy treatment.

This Court has previously observed that the trial court may order conditions of community custody that are left to the discretion of a defendant's sexual deviancy treatment provider. State v. Sansone, 127 Wn. App. 630, 643, 111 P.3d 1251 (2005). In this case, the trial court prohibited the possession and purchasing of alcohol only if the treatment provider determines that such prohibition is required in the course of sexual deviancy treatment. Therefore, the condition is valid and this Court should affirm.

Peralta-Reyes next claims that the condition prohibiting him from possessing or perusing sexually explicit materials unless authorized by the sexual deviancy treatment provider is also invalid. More specifically, Peralta-Reyes claims that the trial court improperly delegated authority to the treatment provider to define what constitutes "sexually explicit materials." Brief of Appellant, at 7-18. These arguments should be rejected based on controlling authority from this Court.

First, in State v. Smith, 130 Wn. App. 721, 123 P.3d 896 (2005), rev. denied, 157 Wn.2d 1026 (2006), this Court held that improper delegation of authority claims, such as the one raised by Peralta-Reyes, are not manifest errors of constitutional magnitude under RAP 2.5. Smith, 130 Wn. App. at 728-29. Accordingly, such claims will not be considered for the first time on appeal if they were not raised at sentencing. Id. In this case, other than a general, baseless objection to "all of those conditions" in Appendix H of the judgment and sentence, no argument regarding improper delegation of authority was raised at sentencing. 4RP (10/22/10) 762. Therefore, Smith is directly on point, and Peralta-Reyes's claim is waived.

In addition, in Sansone, although this Court held that it was improper for the trial court to delegate to the Department of Corrections Community Corrections Officer the authority to define the vague term "pornography," this Court further observed:

A delegation would not necessarily be improper if Sansone were in treatment and the sentencing court had delegated to the therapist to decide what types of materials Sansone could have. In such a circumstance, the prohibition is not necessarily static – it is a prohibition that might change as the probationer's treatment progressed, and is thus best left to the discretion of the therapist.

Sansone, 127 Wn. App. at 643. In this case, unlike in Sansone, the trial court did precisely what this Court suggested, *i.e.*, left to the discretion of the therapist what types of materials Peralta-Reyes could have. Accordingly, the trial court's order is proper.

D. CONCLUSION

This Court should uphold the conditions of community custody, and affirm.

DATED this 6th day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. PERALTA-REYES, Cause No. 66300-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name

Done in Seattle, Washington

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Date