

66846-3

66846-3

NO. 66846-3-I

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

STATE OF WASHINGTON,

Respondent.

v.

GREG MILLER,

Appellant.

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

The Honorable Michael Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by ordering the conditions of community custody that appellant: 1) pay the costs of the victim's counseling and medical treatment; 2) not possess alcohol and not frequent establishments where alcohol is the chief commodity for sale; 3) not associate with known users or sellers of illegal drugs; 4) not possess drug paraphernalia; 5) stay out of drug areas; 6) participate in substance abuse treatment and; 7) submit to plethysmograph examinations at the direction of the Community Corrections Officer. CP 30 (conditions 2,4,6,7,8,12,13).

Issues Pertaining to Assignment of Error

1. The judgment and sentence imposed a number of conditions of community custody. The court imposed five community custody conditions related to alcohol or illegal drugs, including appellant not possess alcohol or frequent establishments where alcohol is the chief commodity for sale, not possess drug paraphernalia or associate with known users or sellers of illegal drugs, stay out of drug areas, and require that he participate in substance abuse treatment. Where there is no evidence alcohol or illegal drugs were connected with appellant's offense, should these conditions be stricken because they are neither authorized by statute nor crime-related?

2. As a condition of community custody the ordered appellant to pay the costs of the victim's counseling and medical treatment. Where that condition is not authorized by statute, not ordered as part of the restitution order and circumvents the statutory restitution scheme should that condition be stricken?

3. As a condition of community custody the court ordered appellant submit to plethysmograph examination at the direction of the Community Corrections Officer. Professionals may use plethysmograph testing in diagnosis and sexual deviancy treatment but may not use the testing to monitor compliance with conditions of community custody. Does the condition that appellant submit to plethysmograph examination at the direction of the Community Corrections Officer, who is not a professional treatment provider, violate appellant's right to be free from government intrusion into his body and right to privacy?

B. STATEMENT OF THE CASE

Gregory Miller was charged by amended information filed the Snohomish County Superior Court with second degree rape. CP 95-96. The information alleged Miller committed the offense on September 8, 2008. *Id.*

A jury found Miller guilty as charged. CP 51. Based on an offender score of 0, Miller was sentenced within the standard range to a minimum term of 90 months and a maximum term of life. CP 17-31.

The court also imposed 16 conditions of community custody. CP 30 (Appendix A to Judgment and Sentence). Those conditions included that appellant not possess alcohol or frequent establishments where alcohol is the chief commodity for sale, that he not possess drug paraphernalia or associate with known users or sellers of illegal drugs, that he stay out of drug areas, that he participate in substance abuse treatment, that he pay the costs of the victim's counseling and treatment and that he submit to plethysmograph examination at the direction of the Community Corrections Officer. CP 30 (Appendix A, conditions 2,4,6,7,8,12,13).

C. ARGUMENT

1. THE SENTENCING COURT ACTED OUTSIDE ITS AUTHORITY BY IMPOSING COMMUNITY CUSTODY CONDITIONS THAT WERE EITHER NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE, UNAUTHORIZED BY STATUTE OR VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM BODILY INTRUSION AND HIS RIGHT TO PRIVACY.

A court may impose a sentence that is only authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Armendariz, 160 Wash.2d 106, 110.

156 P.3d 201 (2007); State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating the conditions. State v. Sanchez Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010); State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998).

“The law in effect at the time a criminal offense is committed controls the sentence.” State v. Acevedo, 159 Wn.App. 221, 231, 248 P.3d 526 (2010) (citing State v. Schmidt, 143 Wn.2d 658, 673–74, 23 P.3d 462 (2001)). The jury found Miller committed the offense on September 8, 2008. CP 61. At that time, a person convicted of second degree rape was sentenced under former RCW 9.94A.712 (2006).¹ See, RCW 9.94A.345 (any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed). That statute authorized a trial court to impose a term of community custody. Former RCW 9.94A.712(5).

¹ The provision was recodified as RCW 9.94A.507 by Laws 2008, ch. 231, § 56, effective August 1, 2009

Under former RCW 9.94A.712(6)(a)(i), the court was also required to impose the conditions of community custody in former RCW 9.94A.700(4)², unless the conditions were waived. The court was also permitted to impose any or all the conditions in former RCW 9.94A.700(5).

Former RCW 9.94A.700(4) conditions are:

- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- (d) The offender shall pay supervision fees as directed by the department; and
- (e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

Former RCW 9.94A.700(5) permitted a sentencing court to impose any or all of the following conditions of community custody:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

² Former RCW 9.94A.700 was re-codified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

In addition, a trial court could order participation in rehabilitative programs or to otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. Former RCW 9.94A.712(6)(a)(i).

a. The Court Erred in Prohibiting Miller from Possessing Alcohol or Frequenting Establishments Where Alcohol is the Chief Commodity for Sale

A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...." Former RCW 9.94A.030(13) (2006). The court's decision to impose a crime-related prohibition is reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." Id.

Although former RCW 9.94A.700(5)(d) authorized the trial court to prohibit alcohol consumption, the court went further and required that Miller not possess alcohol and not frequent establishments where alcohol is the chief commodity for sale. CP 30 (condition 4). Because these

conditions are not included in former RCW 9.94A.700(5), the trial court had no authority to impose them unless they reasonably related to the circumstances of the offense. Former RCW 9.94A.712(6)(a)(i). They do not.

In State v. Jones, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003) the court held that because the evidence failed to show alcohol contributed to Jones' offenses or that the alcohol counseling condition was crime-related, the trial court erred by ordering Jones to participate in alcohol counseling. The court acknowledged RCW 9.94A.715(2)(b) permitted a trial court to order an offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. Id. The court held, however, that "...alcohol counseling reasonably relates to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense." Jones, 118 Wn. App. at 208 (footnote omitted).³

Here there was no evidence alcohol contributed to the offense. There was no evidence Miller consumed any alcohol before or during the

³ Although Jones was sentenced to community custody under former RCW 9.94A.715, former RCW 9.94A.712, contains the same reasonably related language.

offense or the offense was in any way related to establishments that primarily sell alcohol. The condition prohibiting Miller from possessing alcohol or frequenting establishments where alcohol is the chief commodity for sale is too broad and not reasonably related to the circumstances of his alleged offense.⁴ CP 30 (condition 4).

b. The Court Erred in Prohibiting Miller from Associating With Known Drug Users or Sellers of Illegal Drugs, Possessing Drug Paraphernalia and Being in Drug Areas

Careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (citing State v. Riles, 135 Wn.2d at 347). Because prohibiting contact implicates a person's constitutional rights to free speech and freedom of association, "...Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime." Id. at 33 (citations omitted).

In Riles, the Court ruled that because co-appellant Gholston was convicted of raping a 19-year-old woman, the community placement

⁴ The court may order an offender to "remain within, or outside of, a specified geographical boundary." Former RCW 9.94A.700(5)(a). Prohibiting Miller from "frequent[ing] establishments where alcohol is the chief commodity for sale." is not a "specified geographical boundary."

condition prohibiting contact with minor- age children without the approval of the Community Corrections Officer or mental health treatment counselor was an unauthorized infringement on his rights to free speech and freedom of association. Riles, 135 Wn.2d at 350. The Court held the statutory authority to order no contact with a specified class of individuals did not justify prohibiting Gholston from contacting minors where the victim was an adult. Id. at 352-53. Here, Miller’s offense did not involve illegal drugs or drug sellers or users. The condition prohibiting association with known drug users or sellers is improper. CP 30 (condition 6).

The same analysis applies to the condition prohibiting Miller from drug areas as defined by the Community Corrections Officer. This condition essentially banishes Miller from certain specified areas. Banishment orders encroach on an individual's constitutional right to travel and must be narrowly tailored to serve a compelling state interest. State v. Sims, 152 Wn. App. 526, 531-532, 216 P.3d 470 (2009) (citations omitted); see, State v. Warren, 165 Wn.2d at 32 (careful review of sentencing conditions required if the condition interfere with a fundamental constitutional right). The condition requiring Miller to “stay out of drug areas” when there was no evidence Miller’s offense was drug

related or connected with illegal drugs is an improper infringement on his right to travel and is improper. CP 30 (condition 8).

Additionally, because drugs were in no way connected with Miller's offense, the prohibition that he not possess drug paraphernalia is not crime related. In Sanchez Valencia, the Court held a similar community custody condition (prohibiting the possession or use of paraphernalia that can be used for ingestion or processing of controlled substances) was unconstitutionally vague. Sanchez Valencia, 169 Wn.2d at 794-795. The condition prohibiting Miller from possessing drug paraphernalia is likewise improper because it is not crime related and it is unconstitutionally vague. CP 30 (condition 7).

c. The Court Erred in Ordering Miller to Participate in Substance Abuse Treatment

In a related condition, the court ordered Miller to participate in substance abuse treatment as directed by the Community Corrections Officer. A sentencing court may order a defendant to "participate in crime-related treatment or counseling services" as a condition of community custody. Former RCW 9.94A.700(5)(c). Court ordered treatment, however, must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. at 208. Because there was no evidence the use of any substances contributed to the offense, the condition that Miller

participate in substance abuse treatment as directed by the Community Corrections Officer is improper. CP 30 (condition 12).

d. The Court Erred in Ordering Miller Pay the Cost of the Victim's Counseling and Medical Treatment

The costs associated with a victim's counseling or treatment may only be imposed as part of a restitution order under RCW 9.94A.753(3). Under former RCW 9.94A.700 there is no authorization for the court to impose restitution for the victim's counseling expenses as a condition of community custody.

Numerous statutory and constitutional safeguards surround the legitimate imposition of restitution. See, In re Pers. Restraint of Sappenfield, 92 Wn. App. 729, 742, 964 P.2d 1204 (1998) (due process requires notice and a hearing before the court may imposed the obligation to pay restitution); State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) (State has the burden of establishing, by preponderance of evidence, causal connection between restitution requested and crime), aff'd, 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (due process requires defendant have opportunity to rebut evidence presented at restitution hearing and evidence must be reasonably reliable); State v. Martinez, 78 Wn. App. 870, 882,

899 P.2d 1302 (1995) (non-victims are not entitled to restitution); RCW 9.94A.030(41) (restitution must be for specific sum of money).

The trial court cannot circumvent those safeguards by ordering counseling costs as a condition of community custody. Allowing the court to impose such costs as a condition of community custody would render the restitution statute superfluous. See, Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

Here, the court imposed restitution in the amount of \$346.37. CP 32-33. It did not impose any additional restitution for the cost of the victim's counseling or medical treatment. The community custody condition requiring Miller to pay the cost of the victim's counseling and medical treatment is improper. CP 30 (condition 2).

e. The Court erred in Requiring Miller to Participate in Plethysmograph Examinations as Directed by the Community Corrections Officer

In Riles, the Court upheld plethysmograph testing for the diagnosis and treatment of sex offenses where sexual deviancy treatment is ordered. Riles, 135 Wn.2d at 343-344. It found, however, that plethysmograph testing does not serve a monitoring purpose. Id. at 345.

Furthermore, the Fourth and Fourteenth Amendments to the United States Constitution protect an individual from bodily invasions. Sell v. United States, 539 U.S. 166, 177-178, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952); In re Marriage of Parker, 91 Wn. App. 219, 957 P.2d 256 (1998). The constitutional right to privacy also protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007) (citation omitted). Plethysmograph testing implicates the constitutional right to privacy. Parker, 91 Wn.App. at 226.

Here, although Miller was ordered to participate in sexual deviancy treatment, the condition that he submit to plethysmograph examinations is part of the condition that he also submit to urinalysis, breathalyzer and polygraph examinations, which are used to monitor compliance with the community custody conditions. See, Riles, 135 Wn.2d at 342-343 (polygraph testing authorized to monitor compliance with conditions of community custody); see also, State v. Vant, 145 Wn. App. 592, 603-604, 186 P.3d 1149 (2008) (urinalysis and breathalyzer testing authorized to monitor compliance with conditions prohibiting consumption of alcohol or illegal drugs).

In addition, the court ordered Miller to submit to a plethysmograph examination at the direction of the Community Corrections Officer. If

plethysmograph examinations were ordered for the purpose of treatment or diagnosis then there is no rational reason why the examinations can be ordered by the Community Correction Officer. A Community Correction Officer is not the treatment provider.

The plethysmograph examination condition is not directed at the diagnosis and treatment for sexual deviancy. Because the condition authorizes the Community Corrections Officer to order the examination divorced from any diagnosis or treatment and for any reason and because the authorization is found in the same condition authorizing other monitoring tests, it is for the purpose of monitoring compliance with conditions of community custody. Its use for that purpose is unauthorized and improper and violates Miller's constitutional rights. The condition is improper. CP 30 (condition 13).

D. CONCLUSION

The trial court exceeded its statutory sentencing authority by imposing community custody conditions that were either unauthorized by statute, were not crime-related or violated Miller's constitutional rights. This Court should remand and order the above unlawful conditions vacated.

DATED this 22 day of August, 2011.

Respectfully submitted,

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