

66872-2

66872-2

NO. 66872-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA KNOX,

Appellant.

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

The Honorable Kenneth L. Cowser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in affirmatively misadvising appellant of the maximum penalty he faced when appellant was choosing between his right to proceed pro se and his right to proceed represented by counsel.

2. The trial court erred in entering judgment and imposing sentence for delivery of a controlled substance. CP 2, 4-5, 15-19; 2RP 178-91.<sup>1</sup>

3. The trial court erred in including the delivery conviction in appellant's offender score and in finding the offender score to be five points. CP 4.

4. The trial court erred in imposing the count I sentence based on an erroneous offender score. CP 4-5.

5. The trial court erred in imposing a condition of community placement requiring appellant to "not frequent establishments where alcohol is the chief commodity for sale." CP 11.

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<sup>1</sup> This Brief refers to the transcripts as follows: 1RP – stipulation hearing (9/23/10); 2RP – Trial and Sentencing (January and February, 2011).

### Issues Related to Assignments of Error

1. Did the trial court's Faretta/Hahn<sup>2</sup> colloquy fail to satisfy constitutional requirements where the court clearly erred in informing appellant the maximum penalty was 10 years, when it was actually 20 years?

2. Was the error compounded by the court's failure to inform appellant of the maximum \$40,000 fine, as well as the prosecutor's erroneous statement that the penalty was "probably max'd [sic] out at 100 months"? 2RP 15.

3. Did the court violate appellant's double jeopardy and due process rights when it entered judgment on controlled substances homicide (count I) and delivery of a controlled substance (count II), where the elements of count II were necessarily included in count I?

4. Is resentencing necessary on count I where the offender score is erroneous and the court did not impose a low-end sentence?

5. Did the trial court lack statutory authority to impose a community custody condition requiring Knox to "not frequent establishments where alcohol is the chief commodity for sale," where the condition is not crime-related?

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<sup>2</sup> Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986).

6. Is the condition unconstitutionally vague?

7. In light of this Court's previous unpublished decisions rejecting this community custody condition, and in the interest of judicial economy, should this Court issue a published decision that conclusively rejects the condition and directs Snohomish County to remove the condition from its boilerplate judgment and sentence forms?

B. STATEMENT OF THE CASE

1. Procedural Facts

On June 23, 2010, the state charged appellant Joshua Knox with one count of controlled substances homicide. The incident leading to the charge occurred December 10-11, 2009. CP 30-34.

On September 23, 2010, through counsel, Knox stipulated to the admissibility of several statements made to responding and arresting officers. CP 26-28; 1RP 1-2. On January 10, 2011, advised by the same attorney, Knox waived his right to a jury trial. CP 21; 2RP 20-21. The matter was then tried to the Honorable Kenneth L. Cowsert. 2RP 28-190.

Sentencing occurred February 22, 2011. The court denied Knox's request for a DOSA or a 72-month sentence. 2RP 204-09.

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The state recommended an 88-month sentence, pointing out the mitigating factor that Knox had called 911 and requested aid. 2RP 198, 210-11. The court rejected the recommendations and instead imposed a high-end 100-month sentence. CP 5; 2RP 210-12. The court also ordered a 9- to 12-month period of community custody, one condition of which directed Knox to “not frequent establishments where alcohol is the chief commodity for sale.” CP 11.

2. Faretta Colloquy

Prior to trial Knox expressed his dissatisfaction with counsel. He stated he wanted to dismiss his attorney. Knox stated he was misled by his attorney’s “quick tongue and lies.” 2RP 4. He requested “a court-appointed attorney or the right to represent myself in this life-altering case.” 2RP 5.

Knox listed several specific complaints with counsel. 2RP 5-8. At the end he asked if he could fire counsel and if the court would appoint a public defender. 2RP 8.

The state responded by stating Knox had two options: “he can go pro se or he can have [retained counsel] continue to represent him. 2RP 8-9. The state objected to any continuance, noting that an out-of-state witness would arrive that evening, as would at least one member of the victim’s family. 2RP 9.

The state noted that Knox previously had a public defender, but later hired his current counsel. Counsel for the state argued that current defense counsel had strongly negotiated the case, in part based on a statutory mitigating factor when a person summons aid for another who overdoses on a controlled substance. 2RP 9. Counsel for the state argued that defense counsel had been “working hard” for Knox. 2RP 10.

The state concluded by asking the court to deny any motion for continuance and to ask Knox “does he want to go pro se or does he want to have [retained counsel] proceed with this trial.” 2RP 10. The state also suggested that counsel “stay on board as standby counsel[.]” 2RP 10.

The court confirmed that Knox previously had been represented by the public defender’s office, but that retained counsel had visited Knox and Knox decided to let him handle the case. The court noted counsel had a reputation as “a competent attorney” and Knox needed to “stop thinking [counsel] should work a miracle.” 2RP 11.

The court stated Knox was either proceeding to trial pro se or with his current counsel. 2RP 12. The court then engaged in a Faretta/Hahn colloquy. The court discussed Knox’s level of education

then asked the state “what is the maximum sentence for controlled substances homicide?” 2RP 13. The prosecutor responded, “10 years, your honor; it’s a Class B felony.” 2RP 10. The prosecutor listed the same incorrect maximum for the delivery charge. 2RP 10. The standard range for the homicide charge was ultimately stated as 68-100 months. 2RP 13-15. The prosecutor said it was “unclear” if Knox could serve more than 100 months, “but we are probably max’d [sic] out at 100 months.” 2RP 15.

The court continued, noting a court could not tell Knox anything about the representation or how to present evidence. The court mentioned it would talk about the possibility of standby counsel “in a little bit.” 2RP 15-16. It never did.

Knox said he felt he was being forced into going pro se. He also stated that counsel had told him he would be eligible for a DOSA if he pled guilty to manslaughter, which was untrue. 2RP 16.

The court continued its inquiry, asking whether Knox was familiar with the rules of evidence and applicable statutes. He was not. The court asked if he could competently examine a witness, and Knox thought it was possible if given time to prepare. 2RP 18.

The court then asked what made Knox think he would want “to do this on your own, as opposed to being represented by an

attorney?” Knox answered that he would rather not do it on his own. 2RP 18. He also felt he had been manipulated by the advice of others, including other inmates. 2RP 19. The court criticized “jailhouse lawyers” as “absolutely worthless[.]” 2RP 19.

The court then directed Knox to choose whether he wanted to proceed pro se or be represented by current counsel. Knox asked if he had to answer. The court directed Knox to answer. Knox then said “I have no choice but to accept [counsel] as my attorney.” 2RP 19-20. The first thing counsel did after that was convince Knox to waive his right to a jury trial. 2RP 20-21; CP 21.<sup>3</sup>

### 3. Trial Testimony

About 8:30 a.m. on December 11, 2009, medics and police responded to a call from a Mountlake Terrace address. The call referenced a woman who had potentially overdosed. 2RP 30-31, 61-63, 71-72. The woman was Bridgette Johns, a friend of Knox’s. 2RP 35, 76. The house was owned by Knox’s father. 2RP 65.

Medics responded and tried CPR on Johns. Knox was concerned about her and was upset. 2RP 67-68, 73-76.

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<sup>3</sup> This was to the same judge who minutes before said he had “read the Affidavit of Probable Cause,” while suggesting that counsel would have to “work a miracle” to prove Knox’s innocence. 2RP 11-12.

Officer Delsin Thomas interviewed Knox at the scene, while medics were tending to Johns. Knox said Johns often contacted him when she wanted to get away from her boyfriend. He thought she had been clean for a couple months. He bought the "8-ball" (roughly 1/8 ounce or 3.5 grams) of heroin on December 10<sup>th</sup>. He picked up Johns in the U-District and arrived at his house around 10:00 that night. 2RP 76-77.

He thought he used around 2.8 grams and she used about 1/2 to 1 gram. 2RP 77-78. The medics were concerned that Knox had taken the same heroin and were concerned about potential contaminants. Knox said he was not feeling well. 2RP 62-64, 80-81. Knox was transported to Stevens Hospital. 2RP 64, 80-82.

Detective Pat Lowe collected evidence at the scene, then went to Stevens Hospital to interview Knox. 2RP 32-56. Knox appeared under the influence of drugs, with droopy eyes and slurred speech. 2RP 45, 74-75. He said he was not feeling good. 2RP 57. Thomas described him as "on the nod," falling asleep and then coming back to consciousness. 2RP 83-84. Knox nonetheless was cooperative with the officers and responded to their questions. 2RP 74-75, 82-84.

Knox told Lowe that Johns had called him from the U-District in Seattle. She wanted a ride and he agreed. They first went to his

place to have sex, and he offered her some heroin. She agreed. He could not get erect, however, so they did not have sex. 2RP 48-51, 60, 79.

Knox said he bought about 2 grams of heroin from Jorge in Seattle the previous night. He broke off a piece for Johns that was between half a gram and a gram, and she said the amount was fine. He thought she had been clean for a while, but it turned out she had her own heroin kit and had been using. 2RP 37-41, 49-50, 59, 159. The autopsy showed she had injection marks in multiple sites. 2RP 124, 136-37, 141-42.

She also had several prescription medications in her possession. 2RP 37, 58. One was present in her blood, but the other two were not. 2RP 99, 118.

They went to sleep between 10:30 and midnight. At some point she woke up complaining about ringing in her ears. Knox said he told her to go back to sleep and not worry about it. She woke up a second time around 3:45 feeling sick to her stomach and still with ringing ears.<sup>4</sup> They talked about having sex but decided against it because Knox's father was across the hall. 2RP 52-53, 79.

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<sup>4</sup> According to Thomas, Knox said he told Johns to sleep it off because he did not want to get in trouble with his father. 2RP 79-80.

About 4:00 a.m. Knox woke up and Johns was snoring loudly. He thought about turning her over in case she threw up, but decided not to do that. He rolled over and went back to sleep. He woke up around 8:00 or 8:30 and Johns was unconscious with foam coming from her mouth. She did not appear to be breathing. He called 911 and started CPR. 2RP 54-57, 79-80.

According to Lowe, when Knox described the incident he teared up and said "It's kind of stupid. I should have known better." "What are you gonna do, when they're rubbing on your dick, you just give in and give it to them." 2RP 51-52.

The state brought in two forensic witnesses in an effort to establish the reasons for Johns' death. Justin Knoy was a forensic toxicologist at the Washington State Toxicology Lab. 2RP 86-87. He examined urine samples from Johns and "peripheral blood" taken from a vein in her leg. 2RP 90.

The urine screens showed a variety of narcotic drugs in her system. 2RP 93-97. She also had been smoking marijuana. 2RP 93. The blood analysis returned negative results for alcohol<sup>5</sup> (2RP 98, 127-28), but confirmed that Johns had a variety of drugs in her system. 2RP 98-118.

The first was citalopram, an antidepressant, at .05 mg/liter. This apparently was consistent with a therapeutic level. 2RP 101-02, 128-29.

The blood samples revealed a 1.13 mg/liter level of benzoylecgonine, a cocaine metabolite. Knoy said it was not possible to know how much cocaine Johns took or when she took it because people metabolize drugs at different rates. 2RP 102. He did note there was no actual cocaine, only the metabolite, so the drug had not been consumed "recent to the time of the blood draw." 2RP 104. Knoy was unwilling to further opine when Johns might have consumed the cocaine. 2RP 109-11.

The blood also contained morphine, a metabolite of heroin. Heroin metabolizes quickly, with a half-life of 2-5 minutes. The morphine level was 0.13 mg/liter. Knoy was unwilling to say whether that was a small or large amount, since users can develop tolerance to opiates. 2RP 104-09, 112.

Knoy could not tell how much heroin or morphine Johns took, due to variations in dosage and strengths. He could not tell if she took cocaine at the same time. 2RP 106-07. He said the blood contained no 6-acetylmorphine, a morphine metabolite, with a half-life

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<sup>5</sup> See argument 3a, infra.

of 5-30 minutes. 2RP 105-06. He said 6-acetylmorphine is not always present when a person dies from a heroin overdose. 2RP 107, 112-13.

Knoy noted that a person may die of respiratory depression as a result of a heroin overdose. He thought the person could go into distress several hours after injecting the drugs, rather than immediately. 2RP 112-15. Knoy said a person can overdose on cocaine, but cocaine usually will damage a person's heart over time, rather than cause an immediate overdose. 2RP 115-17.

The state also called Dr. Norman Thiersch, the Snohomish County medical examiner. Thiersch confirmed Johns had multiple needle punctures in the crook of each arm, as well as in her groin area. 2RP 124, 136-37, 141-42.

Thiersch concluded Johns had early pneumonia, with bronchitis and inflammation of the lungs. He said her death could be explained by that, absent other findings. 2RP 126.

Thiersch relied on the toxicology lab report to reach his other opinions. 2RP 127-28. Thiersch concluded the cocaine metabolite level of 1.13 mg/liter "represents quite a bit of cocaine. This is a lethal level of cocaine." 2RP 131, 138. The state offered no evidence to suggest Knox delivered cocaine to Johns.

Thiersch also described the effects of morphine consumption. Morphine is a central nervous system depressant that may depress respiration. He noted that loud snoring sounds can happen with an overdose or with death in general, and may be "agonal respirations." He thought this could indicate a person was dying. 2RP 131-34.

Thiersch said the morphine level of .13 mg/liter "contributed to" Johns' death, and could explain her death on its own. He said that the other drugs, "in combination," caused her death. 2RP 134. He also called the morphine level a "lethal" level. 2RP 138.

Thiersch said the "mechanism" of death was probably due to the physiological function of the drugs, with morphine causing respiratory depression and cocaine causing cardiac arrhythmia. He did not opine on the "manner of death." His conclusion on the "cause of death" was acute intoxication from the "combined effect" of citalopram, benzoylecgonine, morphine, and bronchial pneumonia." 2RP 136, 140.

The state also called Steven Duce, who identified himself as Johns' boyfriend. Duce formerly was a heroin addict. At the time of trial he worked at an intensive inpatient drug rehabilitation center. 2RP 142-44. When they were together, Duce was 24, and Johns was 18. 2RP 157.

He described using heroin regularly with Johns in 2009. They met Knox at a bus stop, then called him later. He sold heroin at a cheaper price so they bought from him. 2RP 146-48, 155.

He said they tried to stop using for two months, but on Halloween in 2009 Duce overdosed and Johns called an ambulance. He was at the hospital close to four hours and believed he had been near death. He had not used heroin since. 2RP 150-51.

He claimed he and Johns had been together “[p]retty much 24/7” in the days before her death. 2RP 152. But he also admitted at some point there had been an order prohibiting his contact with Johns and that he had not seen her for 2-3 days before her death. 2RP 156, 160.

On cross he admitted his overdose happened right after he injected the heroin, as had other overdoses he had seen. It did not happen hours later. 2RP 158, 160. On both occasions the person had been drinking a lot. 2RP 161.

#### 4. Court’s Findings and Conclusions

The court’s oral ruling and written findings summarized the testimony. CP 15-18; 2RP 180-91. The court concluded Knox knowingly delivered heroin to Johns on or about December 10-11, 2009. Johns’ use of the heroin resulted in her death. CP 18. The

court relied on Kroy's determination that Johns died as a result of the heroin use, which metabolized into morphine and "depressed her respiratory system to the point where she was no longer able to function." CP 19. The court rejected the defense argument the cause of death was multiple drugs. CP 16-19. The court said it found Kroy's determination more credible than Dr. Thiersch's, stating Kroy was more skilled than a medical doctor or pathologist in the "analysis, identification, and effect of drugs[.]" CP 19.

This appeal timely follows.

C. ARGUMENT

1. THE COURT'S FARETTA COLLOQUY WAS FATALLY FLAWED, REQUIRING REVERSAL OF THE CONVICTIONS AND REMAND FOR A NEW TRIAL.

The state and federal constitutions guarantee an accused the right to counsel at all critical stages of a criminal proceeding, including sentencing. These provisions also guarantee the right to self-representation. U.S. Const. amend. 6, 14; Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). Before a trial court may accept a waiver of counsel, the court must ensure the accused knows the risks inherent in self-representation, including the maximum penalty. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). This is usually accomplished through a colloquy. Silva, at 540 (citing Acrey, at 211).

The prosecutor and trial court informed Knox the maximum penalty he faced was a 10-year prison term. 2RP 13-15.<sup>6</sup> This was

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<sup>6</sup> The prosecutor and court did not bother informing Knox of the potential \$20,000 fine for someone without a prior VUCSA conviction, nor the doubled \$40,000 fine under RCW 69.50.408.

false. The prosecutor compounded the error by stating his conclusion that the state was “probably max’d [sic] out at 100 months.” 2RP 15.

If a person has no prior VUCSA convictions, a controlled substances homicide offense is a class B felony. RCW 9.94A.415(2). Under RCW 9A.20.021(1)(b), the maximum penalty is a ten year term and a fine of \$20,000. But because Knox had prior VUCSA convictions, the maximum penalty was doubled to 20 years and a \$40,000 fine. CP 3; RCW 69.50.408.<sup>7</sup> No one informed Knox he risked these penalties when the trial court forced him to choose between his right to (1) proceed pro se or (2) proceed with counsel he did not trust.

Silva is illustrative. Silva had just completed a trial and “had displayed exceptional skill” as a litigator. Silva, at 540. He had twice previously represented himself in trials. He knew the standard range sentence for the offenses. Nonetheless, this Court held Silva’s waiver invalid, because the trial court failed to inform Silva of the five-year maximum penalty attached to the class C felonies at issue there. Silva, at 541-42.

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<sup>7</sup> The same is true for the delivery charged in count II. RCW 69.50.401(2)(a).

The court not only failed to inform Knox of the maximum penalties, it affirmatively misadvised Knox. The error invalidates the waiver of Knox's right to proceed pro se.

In response the state may claim Knox was unwilling to proceed pro se when informed the maximum penalty was 10 years. From this, the state may speculate Knox would be even less willing to proceed pro se if he had been properly informed of the greater actual exposure.

But Washington courts have rightly condemned the state's same speculative arguments in past cases. An accused's risk management decisions are not subject to after-the-fact scrutiny as to whether the misinformation was material to the decision. See State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006) (rejecting state's argument in context of colloquy to waive trial rights); In re Restraint of Isadore, 151 Wn.2d 294, 301-02, 88 P.3d 390 (2004) (same). As the Mendoza and Isadore courts recognized, a person in Knox's shoes, when erroneously informed that the potential penalty was less than the true statutory maximum, could rationally decide to risk a trial represented by counsel in whom he no longer had confidence.

Because the Faretta/Hahn colloquy was inadequate, this Court should vacate both convictions and remand for a new trial.

2. THE COURT ERRED BY ENTERING JUDGMENT AND IMPOSING SENTENCE FOR COUNT II, DELIVERY OF HEROIN, AND BY INCLUDING COUNT II IN THE COUNT I OFFENDER SCORE.

The state charged Knox with two offenses, controlled substances homicide and delivery of a controlled substance. CP 24. The state conceded the two offenses would merge if the court found Knox guilty of both offenses. 2RP 164. The state's concession is correct, as the elements of the delivery inhere in the elements of controlled substance homicide. See RCW 69.50.415(1) (controlled substance homicide definition, which expressly incorporates the elements of delivery set forth in RCW 69.50.401(2)(a)).<sup>8</sup>

Nonetheless, the court's written findings and judgment include findings that Knox was guilty of both offenses. The court also entered judgment for both offenses and included a point for the count II delivery offense in the count I offender score. CP 2, 4, 15-19.<sup>9</sup> This error violates state and federal protections against double jeopardy.

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<sup>8</sup> See also, WPIC 29.02 (incorporating the elements of delivery into the elements of controlled substance homicide).

<sup>9</sup> The judgment and sentence includes familiar language. Paragraph 2.1 of the "Findings" references the court's finding of guilt on both counts. CP 2. The "Judgment" section states "[t]he defendant is GUILTY of the counts and charges listed in paragraph 2.1. CP 5.

U.S. Const. amend. 5 Const. art. 1, § 9; State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010).

Turner decided the consolidated appeals of Turner and Faagata. Turner was convicted of first degree robbery and second degree assault arising from the same incident. In an effort to not violate Turner's double jeopardy rights, the trial court entered an order "vacating the assault conviction for sentencing purposes but insisting that the assault conviction was 'nevertheless a valid conviction' for which Turner could be sentenced if his remaining robbery conviction did not survive appeal." Turner, 169 Wn.2d at 451-52. The court sentenced Turner only for robbery. Id.

Faagata was convicted of first degree murder and second degree felony murder for a single act. The court also recognized the double jeopardy problem and sentenced Faagata only for first degree murder. It orally stated the felony murder conviction could be reinstated if the first degree murder conviction was vacated, and thereby conditionally dismissed the felony murder conviction. Id., at 453.

Citing State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007) and a number of federal cases, the Supreme Court held both conditional vacations violated double jeopardy. The court recognized

that the entry of the second judgment violates double jeopardy, even if the court imposes no sentence on the second offense. Turner, at 458-60 (quoting, *inter alia*, United States v. Jose, 425 F.3d 1237, 1247 (9th Cir.2005)). The Turner court stated its two-prong holding in these clear terms:

a court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid. To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction – nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

Turner, at 464-65 (court's emphasis).

The judgment and sentence in Knox's case fails both prongs of Turner. The trial court expressly entered judgment on count II and expressly referenced it. CP 2-6. The proper remedy is to vacate the existing judgment and remand for entry of a judgment and sentence – and written findings and conclusions under CrR 6.1(d) – with no reference to a finding of guilt on count II. Turner, at 466; CP 2-6; 15-19.

The court also erred in including the count II sentence in the count I offender score. CP 3-4. An accurate offender score is

generally a prerequisite to a lawful sentence. State v. Parker, 132 Wn.2d 182, 187-88, 937 P.2d 575 (1997).<sup>10</sup> Because the trial court imposed a high-end sentence, the state cannot show the error is harmless. See State v. Gonzales, 90 Wn.App. 852, 854-55, 954 P.2d 360 (technical error may be harmless where court imposes the low end of the range), rev. denied, 136 Wn.2d 1024 (1998).

This Court should strike the count II conviction and findings as required by Turner and Womac and remand for resentencing on count I with an offender score of 4 points.

3. THE COURT ERRED IN PROHIBITING KNOX FROM ENTERING "ESTABLISHMENTS WHERE ALCOHOL IS THE CHIEF COMMODITY" FOR SALE.

When imposing a sentence under Washington's Sentencing Reform Act (SRA), the court's authority is limited to that granted by statutes in effect at the time the offense was committed. RCW 9.94A.345; In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Smith, 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001). Because this is a question of law, a reviewing court owes no deference to the trial court's decision. State

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<sup>10</sup> Although there may be exceptions to this rule where the score is significantly above 9 points, Knox's score should only be 4 points.

v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Unlawful conditions of community placement may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 745-52, 193 P.3d 678 (2008).

a. The Court Erred Because the Condition is not "Crime-Related".

Unless a condition is waived by the court, conditions of community custody must include:

those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.

RCW 9.94A.715(2)(a) (emphasis added).<sup>11</sup>

The following conditions are provided for in RCW 9.94A.700(4):

- (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;

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<sup>11</sup> This brief cites versions of RCW 9.94A in effect in 2009.

- (d) The offender shall pay supervision fees as determined 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.

The following conditions are provided for in RCW 9.94A.700(5):

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

Emphasis added.

Accordingly, any condition not specified in RCW 9.94A.700(4) or (5) must be crime-related. A “crime-related prohibition” is an order that “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(13) (partial).

There is no connection between Knox’s conviction(s) and the requirement that Knox not (1) possess alcohol or (2) frequent establishments that sell alcohol in some significant amount. Although the court could prohibit Knox from consuming alcohol under RCW 9.94A.700(5)(d), further prohibitions were not authorized unless

crime-related. There is no evidence possessing alcohol or going to an alcohol-selling establishment contributed to any current offense.<sup>12</sup> Accordingly, the condition was not crime-related and not authorized. It should be stricken. See, e.g., State v. Jones, 118 Wn. App. at 207-08 (because alcohol did not contribute to Jones' offense, the requirement of alcohol treatment was neither crime-related nor reasonably related to Jones' offense and therefore not authorized by statute).

b. The Prohibition is Unconstitutional as it is not Sufficiently Definite to Provide Notice.

The condition that Knox not enter "establishments where alcohol is the chief commodity for sale" is unconstitutional because it is not sufficiently definite to apprise him of prohibited conduct or to prevent arbitrary enforcement.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the state to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from

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<sup>12</sup> In addition, people may possess alcohol other than to consume it. A party host may make alcohol available for guests, while not intending to drink. People also may go to bars or other establishments where alcohol is sold to meet friends or watch televised events on large television screens.

arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if it does not: (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held the following condition of community placement was unconstitutionally vague:

[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

Sansone, 127 Wn. App. at 634-35.

In Bahl, the Supreme Court held a pre-enforcement challenge to a similar condition was properly raised for the first time on appeal. 164 Wn.2d at 745-52. The unlawful condition in Bahl stated, “[d]o not possess or access pornographic materials, as directed by the supervising [CCO].” Id. at 743. The supreme court held the condition

was invalid even though it identified a third party who could define what fell within the condition. As did Sansone, the Bahl Court noted such a condition “only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758; Sansone, 127 Wn. App. at 639.

The challenged condition does not provide Knox with adequate notice as to what places he is prohibited from entering or frequenting. First, the term “establishment” is remarkably broad and vague, as the term includes public businesses and private residences.<sup>13</sup>

Second, in most cases, it is not possible for a reasonable person to determine, before entering such a place, whether alcohol is the “chief commodity” for sale. While alcohol is likely the primary commodity sold at liquor stores, most “establishments” defy such easy classification. It is often quite difficult (if not impossible) to determine – before entering a neighborhood mini-market, a grocery store, or a local restaurant – whether intoxicating beverages are sold there and

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<sup>13</sup> See Webster’s Third New Int’l Dictionary 778 (1993) (defining “establishment,” in relevant part, as “d: a more or less fixed and usu. sizable place of business or residence with all the things that are an essential part of it (as grounds, furniture, fixtures, retinue, employees) e: a public or private institution (as a school or hospital). . .”).

in what amount. Notice is insufficient where a person would have to interview a property owner before entering an "establishment" to inquire whether alcohol is a "chief commodity" sold there.<sup>14</sup>

Even more problematic, how does a reasonable person quantify what constitutes a "chief commodity"?<sup>15</sup> The court's order offers no standard as to how this is determined. Does each individual business owner arbitrarily determine whether they think alcohol is a chief commodity for sale? Perhaps the standard is based on sales receipts that show a certain percentage of the establishment's income comes from alcohol sales?<sup>16</sup> If so, what percentage of sales would

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<sup>14</sup> When limited by other words, the term "establishment" can be narrowly defined to survive a vagueness challenge. See e.g. World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186, 1198 (9<sup>th</sup> Cir. 2004) (discussing Spokane Code sections defining "adult retail establishment"); Bahl, 164 Wn.2d at 758 (discussing a condition prohibiting Bahl from frequenting "establishments whose primary business pertains to sexually explicit or erotic material.")

<sup>15</sup> To the extent the definition is remotely helpful, "chief" means "the principal or most important part or position." Black's Law Dictionary 232 (7th ed. 1999).

<sup>16</sup> The question can be vexing. See e.g., Beebop's Ice House v. City of Sulphur, 774 So.2d 369 (La. App. 2000) (discussing validity of ordinance allowing restaurants to remain open on Sunday, but requiring closure of other establishments where "alcoholic beverages are the principal commodity sold or handled"); Goodlettsville Beer Board v. Brass A. Saloon, 710 S.W.2d 33, 36-37 (Tenn. 1986) (discussing regulation based on percentage of sales of alcohol and food).

establish alcohol as the "chief" commodity? For example, if a restaurant's receipts show that 25% of its sales are alcohol-related, will Knox violate this condition if he enters to buy a burger?

Maybe the gross quantity of alcohol (number of bottles and cans) determines the standard. Costco may well sell more alcohol as a "commodity" than any other comparable "commodity" class. If so, will Knox violate this condition when he enters Costco?<sup>17</sup> Or is the standard determined by looking at the amount of alcohol consumed by patrons? If so, it is clear that large amounts of intoxicating beverages are sold during various sporting events. Is Knox therefore prohibited from entering Safeco or CenturyLink Fields, or similar venues? As these examples show, a reasonable person cannot describe a standard necessary to avoid arbitrary enforcement.

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<sup>17</sup> This is no small concern, particularly after the recent passage of Initiative 1183 in the November 2011 election. That initiative will close state liquor stores and allow hard liquor sales in new locations, including grocery stores and Costco. Perhaps it is doubtful the trial court intended to preclude Knox from buying groceries, but this vague condition allows community corrections officers to conclude the trial court effectively did so.

In light of recent Washington case law relieving the state from its burden to prove the “willfulness” of community custody violations,<sup>18</sup> it is now even more important for community custody conditions to be specific and clear. A person should not be punished for inadvertently violating an unconstitutionally vague condition.

This condition fails miserably in providing any reasonable notice as to what conduct is prohibited. The question of what violates the condition can be answered subjectively and on a post-hoc basis, allowing for arbitrary enforcement. As such, the condition does not meet the requirements of procedural due process and should be stricken.

c. Knox’s Claim is Ripe for Review.

Although the state has not yet charged Knox with violating the condition, this pre-enforcement challenge is ripe for review. Bahl, 164 Wn.2d at 751 (claim is mature for review when (1) the issues raised are primarily legal, (2) the issues do not require further factual development, and (3) the challenged action is final); accord, State v.

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<sup>18</sup> See State v. McCormick, 166 Wn.2d 689, 702-03, 213 P.3d 32 (2009) (holding the state need not prove nonfinancial violations are willful).

Sanchez Valencia, 169 Wn.2d 782, 787-89, 239 P.3d 1059 (2010).

The trial court's statutory authority to prohibit someone from entering retail establishments is a purely legal question that requires no factual development. Furthermore, the order is final. Sanchez Valencia, 169 Wn.2d at 789 ("The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue.").

The claim is not only ripe for review, similar conditions have been stricken by this Court in unpublished decisions. Now that we have entered the post-Initiative 1183 era, it is particularly appropriate for this Court to issue a published decision that conclusively directs Snohomish County to remove this erroneous condition from its boilerplate judgment and sentence forms. There is no reason for this error to continue.

D. CONCLUSION

Based on argument 1, this Court should vacate the convictions and remand for a new trial. If the convictions are not reversed, count II should be vacated and the case remanded for resentencing on count I with an offender score of 4. The erroneous community custody condition should be condemned and stricken in a published decision.

DATED this 31<sup>st</sup> day of January, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



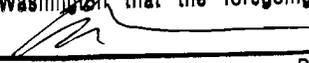
ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

Today I deposited in the mails of the United States of America a properly addressed envelope directed to attorneys of record of the plaintiff containing a copy of the document and the declaration is attached.

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

 7/31/12  
Name Done in Seattle, WA Date

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