

NO. 71713-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON KEMPMA,

Appellant.

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

The Honorable George Bowden, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

11-17-11 2:30 PM
KEMPMA, BRANDON
JENNIFER WINKLER
ATTORNEY

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE CONDITION PROHIBITING POSESSION OF "ILLEGAL DRUG PARAPHERNALIA" SHOULD BE STRICKEN.....	3
1. <u>The condition should be sricken because it is unconstitutionally vague.</u>	3
2. <u>The condition was not authorized by statute because it was not crime-related</u>	5
3. <u>Counsel was ineffective in failing to object to the condition ...</u>	7
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Carle</u> 93 Wn.2d 31, 604 P.2d 1293 (1980).....	7
 <u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	 8
 <u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	 3
 <u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	 5
 <u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	 7
 <u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	 8
 <u>State v. Maurice</u> 79 Wn. App. 544, 903 P.2d 514 (1995).....	 8
 <u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1998).....	 8
 <u>State v. Motter</u> 139 Wn. App. 797, 162 P.3d 1190 (2007),.....	 6
 <u>State v. O'Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008).....	 5, 6, 7
 <u>State v. Parramore</u> 53 Wn. App. 527, 768 P.2d 530 (1989).....	 6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	3, 4, 6
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	7

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7, 8
--	------

RULES, STATUTES AND OTHER AUTHORITIES

David Boerner, Sentencing in Washington § 4.5 (1985).....	7
RCW 9.94A.030	6
RCW 9.94A.703	5
RCW 69.10.102	4
RCW 69.40.412	4
U.S. Const. amend. VI	7
Const. art. 1, § 22	7

A. ASSIGNMENTS OF ERROR

1. The community custody condition prohibiting possession of “illegal drug paraphernalia” is unconstitutionally vague.

2. The court exceeded its statutory authority in entering the condition, as it is not crime-related.

3. Defense counsel was ineffective for failing to object to the illegal condition.

Issues Pertaining to Assignments of Error

1. Must the condition of probation prohibiting the appellant from possessing “illegal drug paraphernalia”¹ be stricken as unconstitutionally vague?

2. Did the court exceed its statutory authority in entering the condition, as it is not crime-related?

3. Was defense counsel ineffective for failing to object to the challenged condition?

B. STATEMENT OF THE CASE²

The State charged Brandon Kempma with three counts of second degree child rape as to complainant S.G. (Counts 1-3). Kempma was also

¹ CP 43 (Condition 13).

² This brief refers to the verbatim reports as follows: 1RP – 9/13/13; 2RP – 11/8/13; 3RP – 12/16/13; 4RP – 12/17/13; 5RP – 12/18/13; 6RP – 12/19/13; 7RP – 12/20/13; and 8RP 3/19/14.

charged with two counts of communicating with a minor for immoral purposes (CMIP), a gross misdemeanor, as to S.G. and her friend L.C. The State charged two additional counts of CMIP via electronic communication, a class C felony, as to both complainants. CP 99-100.

A jury found Kempma guilty on each of the charges. CP 56-62. On Counts 1-3, the court sentenced Kempma to a standard-range minimum term of incarceration, as well as lifetime community custody, under RCW 9.94A.507. CP 33. The court ran the misdemeanor and felony CMIP convictions concurrently to the sentence on Counts 1-3. CP 33.

The court entered community custody conditions as recommended in the presentence investigation report with slight modifications. CP 52. In particular, the court added the word "illegal" to the prohibition on possession of drug paraphernalia. CP 42-43; 8RP 9. Defense counsel did not object to any of the conditions. 8RP 8.

Mr. Kempma timely appeals. CP 1-17.

C. ARGUMENT

THE CONDITION PROHIBITING POSSESSION OF “ILLEGAL DRUG PARAPHERNALIA” SHOULD BE STRICKEN.

1. The condition should be stricken because it is unconstitutionally vague.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

“Appendix 4.2” of the judgment and sentence lists the conditions of community custody. Condition 13 states, “Do not possess illegal drug paraphernalia.” CP 43.

“[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” Bahl, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and that they are protected against arbitrary enforcement of the laws. Id. at 752-53.

In State v. Sanchez Valencia, 169 Wn.2d 782, 785, 239 P.3d 1059 (2010), the Court addressed a sentencing condition that prohibited possession of “any paraphernalia” used to ingest, process, or facilitate the sale of controlled substances” The Court concluded the provision was vague because it failed to provide fair notice and to prevent arbitrary enforcement. Id. at 794-95.

Condition 13 suffers from a similar infirmity. The sentencing court's addition of the word "illegal" to "drug paraphernalia"³ does not cure the problem but rather exacerbates it, as it is unclear whether "illegal" modifies the word "drug" or the phrase "drug paraphernalia." Moreover, possession of "drug paraphernalia" is not in itself illegal. Rather, its *use* is illegal. RCW 69.40.412.

Here, assuming for the sake of argument that the phrase "drug paraphernalia" provides adequate notice, Sanchez Valencia, 169 Wn.2d at 794, the addition of the word "illegal" renders the condition ambiguous at best, and nonsensical at worst, and therefore "fails to provide [a supervised person] fair notice of what they can and cannot do." Id. The vague condition must be stricken. Id. at 795.

³ RCW 69.10.102 defines "drug paraphernalia" to mean "all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance."

2. The condition was not authorized by statute because it was not crime-related

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(e) specifically permits the court to order a defendant not to consume alcohol. RCW 9.94A.703(2)(c) directs the court to order the defendant to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions” unless the condition is waived. Under RCW 9.94A.703(3)(f), the sentencing court may also order the defendant to “comply with any crime-related prohibitions.”

A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which

the offender has been convicted." RCW 9.94A.030(10); State v. Motter, 139 Wn. App. 797, 802, 162 P.3d 1190 (2007), overruled on other grounds, Sanchez Valencia, 169 Wn.2d 782. Such a prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989); see Motter, 139 Wn. App. at 801 (substantial evidence must support that the prohibition is crime-related).

Here, although the State presented evidence that alcohol was involved in one of the counts of child rape as well as the non-electronic-communication CMIP counts,⁴ there was no allegation that "drugs," illegal or otherwise, or "drug paraphernalia" played any role in the offenses.

Moreover, the sentencing court's statement that, in general, drugs can serve as a "disinhibitor" is insufficient to support the condition. 8RP 10. By its nature, a crime-related prohibition must be specific to the offense. O'Cain, 144 Wn. App. at 775; Parramore, 53 Wn. App. at 531; cf. Motter, 139 Wn. App. at 803-04 (prohibition on drug paraphernalia upheld where crime related to offender's substance abuse). "For a sentencing judge to base the determination that conduct is crime-related upon belief alone, without some factual basis, would be to read the crime-

⁴ 4RP 29; 7RP 171, 173.

related requirement out of the statute.”” Parramore, 53 Wn. App. at 531 (quoting David Boerner, Sentencing in Washington § 4.5 (1985)).

The condition prohibiting Kempma from possessing "illegal drug paraphernalia" must be stricken because it is not crime-related. O'Cain, 144 Wn. App. at 775.

When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). This Court should therefore order the sentencing court to strike the condition pertaining to drug paraphernalia. See State v. Jones, 118 Wn. App. 199, 207-08, 212, 76 P.3d 258 (2003) (community custody condition exceeding statutory authority must be stricken).

3. Counsel was ineffective in failing to object to the condition

Kempma's counsel also provided ineffective assistance by failing to object to the illegal condition. 8RP 8.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance when (1) counsel's performance

is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Kempma satisfies both prongs of the Strickland test and therefore has demonstrated he received constitutionally ineffective assistance. There was no legitimate reason for counsel to fail to object to the illegal condition. Counsel is presumed to know applicable statutes favorable to his or her client. See State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (effective assistance includes knowledge of relevant law). Moreover, counsel had no reason to acquiesce to an unconstitutionally

vague condition, which could subject Mr. Kempma to arbitrary enforcement.

There was, moreover, a reasonable likelihood that counsel's deficient performance affected the outcome of sentencing. As set forth above, the condition was illegal under statute and controlling case law. It is unlikely the sentencing court would have imposed it had it been alerted to the illegality of the condition.

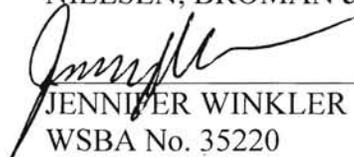
D. CONCLUSION

For the foregoing reasons, the challenged community custody condition should be stricken.

DATED this 27th day of August, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON

Respondent,

v.

BRANDON KEMPMA,

Appellant.

COA NO. 71713-8-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF AUGUST 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

[X] BRANDON KEMPMA
DOC NO. 371270
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF AUGUST 2014.

X Patrick Mayovsky

2014 AUG 27 PM 4:11
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON