

72752-4

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Court of Appeals
Division I
State of Washington

72752-4

COA NO. 72752-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN COUNTRYMAN,

Appellant.

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

The Honorable Millie M. Judge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in revoking appellant's suspended sentence. CP 11-15.

2. Appellant's right to due process was violated in connection with the revocation of his suspended sentence.

3. The court erred in imposing the following condition of community custody: "Do not associate with known users or sellers of illegal drugs." CP 117.

4. The court erred in imposing the following condition of community custody: "Do not possess drug paraphernalia." CP 117.

5. The court erred in imposing the following condition of community custody: "Stay out of drug areas, as defined in writing by the supervising CCO." CP 117.

6. The court erred in imposing the following condition of community custody: "Participate in substance abuse/chemical dependency treatment . . . as directed by the supervising CCO." CP 117.

7. The court erred in imposing the following condition of community custody: "Participate in substance abuse treatment as directed by the supervising Community Corrections Officer." CP 118.

8. The court erred in imposing the following condition of community custody: "Do not possess or access pornographic materials, as directed by

your therapist and the supervising Community Corrections Officer." CP 117.

9. The court erred in imposing the following condition of community custody: "Participate in . . . breathalyzer, plethysmograph . . . examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody." CP 118.

10. The court erred in imposing the following condition of community custody: "You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which you live or have exclusive or joint control and/or access." CP 118.

Issues Pertaining to Assignments of Error

1. Due process requires a person facing revocation of his suspended sentence be properly notified of the basis for revocation, and be given an opportunity to contest the evidence and confront the witnesses against him through cross examination in the absence of good cause for not permitting it. Is reversal of the revocation required because the trial court conducted the revocation hearing in a manner that did not comport with these due process guarantees?

2. Whether the drug-related community custody conditions must be stricken because they are not crime-related, and because the

prohibitions on drug areas and associating with drug user/sellers violate the First Amendment of the United States Constitution? (assignments of error 3-7)

3. Whether the community custody condition prohibiting pornographic materials must be stricken because it is unconstitutionally vague in violation of due process? (assignment of error 8)

4. Whether the community custody condition requiring appellant to participate in plethysmograph examination at the direction of his community corrections officer must be stricken as an unconstitutional bodily intrusion? (assignment of error 9)

5. Whether the community custody condition requiring appellant to submit to breathalyzer examinations is unauthorized because it is not crime-related and does not monitor compliance with another condition? (assignment of error 9)

6. Whether the community custody condition requiring appellant to consent to inspection of his home without reasonable cause violates article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution? (assignment of error 10)

B. STATEMENT OF THE CASE

In 2006, following a bench trial on stipulated facts, Justin Countryman was found guilty of one count of first degree child rape

committed against his four-year-old niece. CP 119-20, 174-85. The court granted a special sex offender sentencing alternative (SSOSA) and imposed a number of conditions as part of the suspended sentence. CP 107-10, 117-18.

In January 2012, the court found Countryman had successfully completed sex offender treatment. CP 75-76. In April 2014, following years of compliance with SSOSA conditions, the Department of Corrections (DOC) alleged Countryman violated several conditions of his sentence. CP 51-73. In May 2014, the court found Countryman violated one condition by having unsupervised contact with two 12-year-old girls on Facebook. CP 45-46; 2RP¹ 7. Countryman received 60 days in jail as a sanction. CP 46. The court ordered him to reengage treatment and prohibited him from having any contact with minors. CP 46.

On September 30, 2014, the DOC issued a notice of violation for failing to report a change of address and for associating with minors without permission from his community corrections officer and therapist. CP 34-40. On October 6, 2014, the DOC issued a supplemental notice of violation that reported results of a follow-up polygraph examination. CP 31-33. The State moved to revoke the SSOSA. CP 191-95.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 11/3/14; 2RP 11/13/14.

In a pre-hearing memorandum, defense counsel objected to consideration of past, alleged violations that had not been proven, which were referenced in the State's brief and the DOC reports dated September 30, 2014 and October 6, 2014. CP 20. Defense counsel further objected to consideration of DOC allegations connected with the prior May 2014 hearing that were not pursued. CP 20-21.

At the revocation hearing, a community corrections officer (CCO) testified that Countryman stayed at a friend's residence for three or four nights to look after animals on his friend's farm without prior approval. 1RP 7. The CCO further testified that Countryman admitted to staying at a friend's house to watch a football game where a six-month-old child was present. 1RP 9.

Defense counsel argued Countryman did not violate the change of residence requirement because there was actually no such requirement in his sentence. 1RP 36-38. Counsel described Countryman's association with a minor as a technical violation. 1RP 38. The court deferred decision until supplemental information was received regarding whether the DOC had previously considered it a violation for Countryman to stay at another residence without prior approval. 1RP 34-35, 39, 41.

Following receipt of supplemental information that the DOC had not previously considered such action to be a violation, the State changed

its recommendation from revocation to sanction. 2RP 2-4; Ex. 4. Defense counsel stipulated to the second violation involving contact with a minor and asked that Countryman be sanctioned with additional conditions imposed. 2RP 4.

The court found Countryman violated a condition of his suspended sentence by associating with minors and visiting a residence where minors reside without previous permission. CP 11; 2RP 5-7. The court did not find the State proved the change of address allegation. 2RP 5-6.

The court revoked the SSOSA. CP 11; 2RP 5-7. In explaining its decision to revoke, the court commented that it went through the "entire file," including the presentence investigation and treatment notes: "The history that he disclosed was that this isn't a new issue, this was something that happened initially back when he was 13 there were two offenses that were never charged. But in the report it – so that leads me to think that this is something that's been going on for a long time. He essentially is sexually aroused by very young children. Why we don't know, but that's just what it is and what was being worked on in treatment." 2RP 5.

The court noted Countryman was sanctioned in April 2014 for having Facebook contact with two 12 year old girls and "[f]ive months later here we are again," entering a residence where a minor was present even though he knew he was not supposed to be there. 2RP 6. The court

further commented that the treatment notes described Countryman's compliance as fair, but the supervising treatment provider now listed his risk of re-offense as low/moderate instead of just low. 2RP 6. "This is all really a concern to the Court." 2RP 6. The court rejected the parties' stipulation to sanctions because it did not protect the safety of the community. 2RP 6-7.

The court ordered execution of the sentence, which consists of an indeterminate term of 123 months minimum to a maximum term of life. CP 12; 2RP 7. The court also imposed a lifetime term of community custody. CP 13. The community custody conditions set out in Appendix A of the original judgment and sentence were incorporated into the present order of commitment. CP 13, 117-18. This appeal follows. CP 1-7.

C. ARGUMENT

- 1. THE COURT VIOLATED DUE PROCESS IN REVOKING THE SUSPENDED SENTENCE BECAUSE COUNTRYMAN LACKED NOTICE THAT THE COURT WOULD CONSIDER CERTAIN EVIDENCE, HE WAS NOT GIVEN THE OPPORTUNITY TO CONTEST THIS EVIDENCE, AND HE WAS DENIED THE RIGHT TO CROSS-EXAMINE THE SOURCES OF THIS EVIDENCE.**

In revoking the SSOSA, the trial court relied in part on evidence of uncharged conduct and a recent risk assessment contained in the court file. In so doing, the court violated Countryman's right to due process. U.S.

Const. amend. V, XIV; Wash. Const. art. I, § 3. Countryman received no notice that the court would consider such evidence as part of the revocation hearing. Countryman was not given an opportunity to contest this evidence. His right to confront and cross-examine those who provided this evidence was violated. The revocation must be reversed.

- a. **Those facing revocation have due process rights that, while described as minimal, remain real, and the trial court here conducted the revocation hearing in a manner that did not comport with due process guarantees.**

The SSOSA statute allows a trial court to suspend a sentence for qualified sexual offenders if the offender is shown to be amenable to treatment. RCW 9.94A.670(2)-(4). The court may later revoke the SSOSA if it is reasonably satisfied the offender violated a condition of the suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(11); State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009).

A trial court's decision to revoke a SSOSA sentence is reviewed for abuse of discretion. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A court necessarily abuses its discretion by violating a constitutional right. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The claimed denial of a constitutional right, including the right to

due process, is an issue of law reviewed de novo. Iniguez, 167 Wn.2d at 280; State v. Simpson, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007).

Persons facing SSOSA revocation are entitled to the same due process rights as those afforded during the revocation of probation or parole. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). Those facing revocation of a SSOSA retain these basic due process rights: (a) written notice of the claimed violations; (b) disclosure to the offender of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. Dahl, 139 Wn.2d at 683 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

"These due process requirements apply to both conceptual stages of the probation revocation hearing: the fact-finding portion during which the court determines whether a probation violation occurred, *and the disposition portion during which the court considers whether the facts as determined warrant revocation.*" State v. Lawrence, 28 Wn. App. 435, 438, 624 P.2d 201 (1981) (emphasis added). The hearing process is structured to assure that the finding of a violation "will be based on verified facts and that the exercise of discretion will be informed by an

accurate knowledge of the (probationer's) behavior." Lawrence, 28 Wn. App. at 438 (quoting Morrissey, 408 U.S. at 484).

Due process requires a statement by the court as to the evidence relied upon and the reasons for the revocation. Dahl, 139 Wn.2d at 683. The court in Countryman's case articulated the evidence relied upon and the reasons for revocation. 2RP 5-7. In so doing, the court revealed that it relied on evidence that was not presented at the revocation hearing and which Countryman did not have an opportunity to contest.

Specifically, the court relied on an allegation contained in the court file that Countryman committed uncharged sexual acts against other children. 2RP 5. Norman Glassman, a sex offender treatment provider who authored the original 2007 evaluation, reported that Countryman disclosed two uncharged acts of molestation against children, one when he was 13 years old and another when he was 10 years old. CP 213, 220. The PSI report referenced Glassman's evaluation on this point. CP 202.

The court also relied on a treatment provider's revised risk assessment. 2RP 6. In a September 2014 treatment report (attached to DOC's October 2014 memorandum on revocation), sex offender treatment provider Stephanie Overton stated her belief that Countryman's risk level to be low/moderate. CP 43.

Both of these allegations formed part of the court's reason for revocation, but Countryman was not given notice that the court would rely on these evidentiary allegations as a basis to revoke the SSOSA. Again, the due process rights guaranteed by Morrissey in the revocation context apply not only to the fact-finding portion during which the court determines whether a violation occurred, but also to "the disposition portion during which the court considers whether the facts as determined warrant revocation." Lawrence, 28 Wn. App. at 438.

"A court must have accurate knowledge of a defendant's conduct and behavior if it is going to consider that conduct in its decision to revoke probation." Id. at 439. The hearing process is structured to ensure that a revocation will be based on verified facts and therefore comports with due process. City of Seattle v. Lea, 56 Wn. App. 859, 862, 786 P.2d 798 (1990). But in Countryman's case, the hearing process was compromised by the court's consideration of facts that Countryman was not given the opportunity to contest by any means. Those facts were not verified within the meaning of the due process guarantee.

Those facing revocation "must have the opportunity to be heard and to present evidence to contest the allegations upon which revocation is sought." Lea, 56 Wn. App. at 862. Because the court cited the uncharged conduct and the updated risk assessment as reasons to revoke only when it

announced its ruling on the matter, Countryman was deprived of any opportunity to contest the accuracy of those allegations or to present additional evidence to rebut those claims. Countryman was denied the due process right to confront and cross-examine the witnesses against him, i.e. Glassman and Overton, and no good cause was found for not allowing such confrontation to challenge the accuracy of their claims. Because Countryman was denied due process of law, the court erred in revoking the suspended sentence. See Iniguez, 167 Wn.2d at 280 (trial court necessarily abuses its discretion by violating a constitutional right).

The due process error cannot be deemed harmless where the revocation appears to have been based, at least in part, on a matter implicating a due process violation. Dahl, 139 Wn.2d at 689. The court at no time specified that it would have revoked the SSOSA based on the violation alone, apart from its consideration of the uncharged conduct and the treatment provider's updated risk assessment. The revocation is therefore tainted by the due process violation.

The due process error is preserved for review. "A person accused of violating the conditions of sentence has some responsibility in ensuring that his or her rights under Morrissey are protected. The accused must, at a minimum, place the court on notice that due process is being violated by making an appropriate objection." State v. Robinson, 120 Wn. App. 294,

297, 85 P.3d 376, review denied, 152 Wn.2d 1031, 103 P.3d 200 (2004). Here, defense counsel objected in her pre-hearing memorandum to consideration of unproved allegations. CP 20-21. That objection was sufficient to put the court on notice that anything other than proven allegations should not be considered as part of the revocation process.

b. On remand, a different judge should preside over the hearing to ensure the appearance of fairness.

The remedy for a revocation affected by a due process violation is reversal of the revocation order and remand for a new hearing. Dahl, 139 Wn.2d at 690; Lawrence, 28 Wn. App. at 439.

On remand, a different trial judge should preside over the revocation hearing to ensure the appearance of fairness. Due process requires not only that there be an absence of actual bias but that justice must satisfy the appearance of justice and impartiality. State v. Madry, 8 Wn. App. 61, 62, 504 P.2d 1156 (1972); U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3. "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

The record here does not reflect a personal bias. But the circumstances warrant reassignment to satisfy the appearance of fairness.

The judge could reasonably be expected to have substantial difficulty in overlooking her previously expressed view of the reasons for revocation. The same concerns that animated the judge's decision at the original revocation hearing would still be present in her mind if she were to preside over the new hearing. It would be unrealistic to think otherwise. The judge could not fairly be expected to conduct another revocation hearing with an open mind, leaving Countryman in the difficult position of essentially asking the judge to reconsider a revocation that she already ordered. To comply with the appearance of fairness, a different judge should preside over the resentencing hearing.²

² See State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920 P.2d 623 (1996) ("the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing."); State v. Sledge, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997) (vacating trial court's disposition and remanding to trial court where Sledge may choose to withdraw his guilty plea or have new disposition hearing before another judge in light of previous judge's expressed view of disposition); State v. Cloud, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999) (trial court's consideration of improper evidence at post-trial hearing required remand before new judge "because it would be extremely difficult, if not impossible, for the trial judge who worked so hard on this case to discount everything that transpired in the first hearing"); State v. Talley, 83 Wn. App. 750, 763, 923 P.2d 721 (1996) ("On remand, we direct that Talley be sentenced by a different judge because the court's statement at the August 11 hearing that she had already decided to give him an exceptional sentence even though there had been no evidentiary hearing suggests she may have prejudged the matter."), aff'd, 134 Wn.2d 176, 949 P.2d 358 (1998).

2. **DRUG-RELATED COMMUNITY CUSTODY CONDITIONS MUST BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED AND TWO OF THEM VIOLATE COUNTRYMAN'S FIRST AMENDMENT RIGHTS.**

As conditions of community custody, the court ordered:

- "Do not associate with known users or sellers of illegal drugs." CP 117 (condition 10);
- "Do not possess drug paraphernalia." CP 117 (condition 11);
- "Stay out of drug areas, as defined in writing by the supervising CCO." CP 117 (condition 12);
- "Participate in substance abuse/chemical dependency treatment . . . as directed by the supervising CCO." CP 117 (condition 13)
- "Participate in substance abuse treatment as directed by the supervising Community Corrections Officer." CP 118 (condition 14)

These five conditions are improper because they are not crime-related. Condition 10 also violates Countryman's constitutional right to freedom of association under the First Amendment, while condition 12 violates his constitutional right to travel under the First Amendment. These five conditions must be removed from the judgment and sentence.

a. **Standard of review**

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court

exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

If statutory authorization exists, then the court's decision to impose a condition is reviewed for abuse of discretion. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A court abuses its discretion if it applies the wrong legal standard. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). A court necessarily abuses its discretion by denying a constitutional right. Iniguez, 167 Wn.2d at 280. Imposition of an unconstitutional community custody condition is therefore manifestly unreasonable. Sanchez Valencia, 169 Wn.2d at 792.

Erroneous sentences 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 them. Sanchez Valencia, 169 Wn.2d at 787.

b. The drug-related conditions are not crime-related.

Upon revocation of the SSOSA, the sentence reverts to an ordinary, non-SSOSA sentence. See Dahl, 139 Wn.2d at 683 ("Once a SSOSA is

revoked, the original sentence is reinstated."). The community custody conditions imposed as part of that non-SSOSA sentence must therefore meet the requirements of former RCW 9.94A.700.³ RCW 9.94A.700(5)(e) authorizes the court to impose crime-related prohibitions. RCW 9.94A.700(5)(c) authorizes the court to order participation "in crime-related treatment or counseling services." A condition is "crime-related" only if it "directly relates to the circumstances of the crime." Former RCW 9.94A.030(13).⁴

Conditions of community custody imposed as crime-related must be supported by evidence showing the factual relationship between the crime and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

There is no evidence that drug use or possession of drug paraphernalia bore a direct relation to Countryman's offense. CP 121-73

³ Laws of 2003, ch. 379 § 4. This brief cites to the version of the statutes in effect as of the date of Countryman's offense (Aug. 1, 2006 to Feb. 16, 2007). CP 119. Courts must look to the statute in effect when an offense was committed in determining the sentence. State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004); RCW 9.94A.345.

⁴ Laws of 2006, ch. 139 § 5.

(stipulated facts); cf. Motter, 139 Wn. App. at 803-04 (prohibition on drug paraphernalia upheld where crime related to offender's substance abuse, as offender used heroin night of burglary and his attorney acknowledged all of his problems stemmed from drug use). According to the pre-sentence report produced in 2007, Countryman used marijuana "usually daily," although it did not affect his life or his work. CP 201. Countryman denied any drug use while babysitting his niece, when the abuse for which he was convicted occurred. CP 202.

In striking down an identical drug paraphernalia condition, this Court has recognized the prohibition cannot be justified as a monitoring tool.⁵ State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013). The drug paraphernalia condition must be stricken because it is not a crime-related prohibition. Land, 172 Wn. App. at 605; CP 117 (condition 11).

The prohibitions on staying out of drug areas and associating with drug users/sellers must fall for the same reason. CP 117 (conditions 10 and 12). Countryman was not convicted of a drug-related offense and there is otherwise no evidence in the record to establish association with drug user or sellers, being in a drug area, or drug use in general, directly

⁵ It is not a crime to use drug paraphernalia to ingest marijuana. RCW 69.50.412.

related to the offense. Cf. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) ("Since associating with individuals who use, possess, or deal with controlled substances is conduct intrinsic to the crime for which Llamas was convicted, it is directly related to the circumstances of the crime.").

Former RCW 9.94A.700(5)(c), meanwhile, allows the court to impose "crime-related treatment or counseling services." Former RCW 9.94A.712(6)(a)⁶ authorizes the 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." But court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). As argued, there is no link of drug use to the crime here, and so the conditions calling for substance abuse treatment must be stricken. CP 117-18 (conditions 13 and 14).

c. Two of the conditions violate the First Amendment.

Further, conditions restricting First Amendment freedoms, such as the right to freedom of association and the right to travel, are permissible only if they are sensitively imposed and reasonably necessary to

⁶ Laws of 2006, ch. 124 § 3.

accomplish the essential needs of the state and public order. Bahl, 164 Wn.2d at 757; State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993).

The court ordered Countryman to "not associate with known users or sellers of illegal drugs." CP 117. There is no indication that the court, in imposing this condition, gave any thought to the constitutional right of association at stake here. Countryman was not convicted of a drug-related offense and so there is no need to prohibit his association with drug users or sellers. Cf. Riley, 121 Wn.2d at 37-38 (upholding prohibition on association with computer hackers where defendant was convicted of computer hacking crimes). The record does not show the condition was sensitively imposed or that it was necessary to accomplish the essential needs of the state and public order.

The court's order to "Stay out of drug areas, as defined in writing by the supervising CCO" fares no better. CP 117. The prohibition implicates Countryman's right to travel. The freedom to travel within the state is a liberty interest protected by the First Amendment. Spence v. Kaminski, 103 Wn. App. 325, 336, 12 P.3d 1030 (2000); State v. Sims, 152 Wn. App. 526, 531, 216 P.3d 470 (2009), reversed on other grounds, 171 Wn.2d 436, 256 P.3d 285 (2011). Again, there is no showing that the trial court sensitively imposed this condition in light of the constitutional interest involved, nor is there anything to show the prohibition on staying

out of drug areas was necessary to accomplish the essential needs of the state and public order for an offense that did not involve drugs.

3. THE CONDITION PROHIBITING PORNOGRAPHIC MATERIAL IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "Do not possess or access pornographic materials, as directed by your therapist and the supervising Community Corrections Officer." CP 117. This condition is unconstitutionally vague in violation of due process.

The due process vagueness doctrine under the Fourteenth Amendment of the United States Constitution 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 arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore 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. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

Courts have held equivalent community custody conditions to be unconstitutionally vague because they did not provide ascertainable

standards for non-arbitrary enforcement. See Bahl, 164 Wn.2d at 754, 758 (striking down community custody prohibition on "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer."); Land, 172 Wn. App. at 604 (striking down "Do not possess, access, or view pornographic materials, as defined by the sex offender therapist and/or Community Corrections Officer."); State v. Sansone, 127 Wn. App. 630, 634-35, 639-41, 111 P.3d 1251 (2005) (striking down "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."). The court imposed the same kind of vague condition on Countryman. CP 117. It must be stricken. Land, 172 Wn. App. at 604.

4. THE PLETHYSMOGRAPH CONDITION VIOLATES COUNTRYMAN'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court ordered Countryman to "Participate in urinalysis, breathalyzer, plethysmograph and polygraph examinations as directed by the supervising Community Corrections Officer, to ensure conditions of community custody." CP 118. The plethysmograph aspect of this condition is unconstitutional.

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Parker, 91 Wn. App. at 224; U.S. Const. amend. V, XIV; Wash. Const. art. 1, § 3.

Requiring submission to plethysmograph testing at the discretion of a community corrections officer violates Countryman's constitutional right to be free from bodily intrusions. Land, 172 Wn. App. at 605. "Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider." Id. Such testing is not a routine monitoring tool subject only to the discretion of a community corrections officer. Id. In this case, the language of the condition itself shows it is intended to be nothing more than a monitoring tool, i.e., "to ensure conditions of community custody." CP 118. The reference to the plethysmograph examination must therefore be stricken. Land, 172 Wn. App. at 605-06.

5. **THE BREATHALYZER CONDITION MUST BE STRICKEN BECAUSE IT IS NOT CRIME-RELATED AND DOES NOT SERVE AS A MONITORING DEVICE FOR OTHER CONDITIONS OF COMMUNITY CUSTODY.**

The court ordered Countryman to submit to breathalyzer examinations "to ensure conditions of community custody." CP 118. The breathalyzer condition must be stricken because it is not crime-related and will not monitor compliance with any other condition.

There is no evidence that alcohol played any role in the offense. CP 121-73, 196-97. As a result, checking for alcohol consumption by means for a breathalyzer is not a crime-related condition.

A trial court has authority to impose monitoring conditions to ensure compliance with other conditions of community custody. State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998) overturned on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). But the trial court did not restrict Countryman's consumption of alcohol as a condition of his community custody. CP 13, 117-18. As a result, the breath test will not serve to monitor another condition of community custody.

Parramore, which involved a marijuana delivery conviction, is instructive. Parramore, 53 Wn. App. at 528. Community custody conditions prohibited Parramore from purchasing, possessing, or ingesting

any controlled substances without a prescription. Id. at 529. Parramore was also ordered to submit to urinalysis or breathalyzer testing in order to monitor his compliance with the controlled substance restrictions. Id. Urinalysis testing was an appropriate monitoring tool for ingestion of controlled substances in accordance with the condition restricting consumption of controlled substances. Id. at 531-32. But it was error to impose the breathalyzer testing condition because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana. Id. at 531. The court noted a breathalyzer test would be appropriate to monitor a prohibition on alcohol consumption if such a prohibition were imposed. Id. at 533.

As in Parramore, no prohibition on alcohol consumption was imposed on Countryman. For this reason, the breathalyzer condition has no role to play in monitoring compliance with another condition and should be stricken.

6. THE CONDITION REQUIRING SUBMISSION TO HOME SEARCHES WITHOUT REASONABLE CAUSE VIOLATES ARTICLE I, SECTION 7 AND THE FOURTH AMENDMENT.

As a condition of community custody, the court ordered: "You must consent to DOC home visits to monitor your compliance with supervision. Home visits include access for purposes of visual inspection

of all areas of the residence in which you live or have exclusive or joint control and/or access." CP 118.

This condition authorizes broad, intrusive, random searches without any basis to suspect that Countryman has actually violated a provision of the sentence. Because the condition authorizes a search without reasonable cause, it is unconstitutional in violation of article I, section 7 and the Fourth Amendment.

- a. **Suspicionless searches of those on community supervision are unconstitutional, and the condition as written violates the standard that searches must be based on reasonable cause.**

Although persons on community custody have a lesser expectation of privacy than the general public, they are still entitled to the protections of article I, section 7 and the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d. 709 (1987); U.S. Const. amend. IV; Wash. Const. art. I, § 7.

"Article I, section 7 is more protective of individual privacy than the Fourth Amendment, and we turn to it first when both provisions are at issue." State v. Byrd, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). Under article I, section 7, a community corrections officer may not search the home or personal effects of a person on community custody without a

warrant unless the officer has reasonable cause to believe the offender has violated a condition or requirement of the sentence. Winterstein, 167 Wn.2d at 628-29.

The constitutional standard is incorporated into the Sentencing Reform Act. RCW 9.94A.631(1) provides "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." The standard of reasonable cause requires a community corrections officer to have a "well-founded suspicion that a violation has occurred" before conducting a warrantless search. State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (2011).

The condition here requires Countryman to "consent" to searches conducted for the purpose of "monitoring" his compliance with supervision. CP 118. It does not require a search be based upon reasonable cause. Thus, on its face, the condition permits a community corrections officer to conduct a routine, random search of Countryman's home and personal effects in order to determine whether he is complying with supervision. It does not require the officer to have reasonable cause to suspect that a violation has occurred. The condition, as written, violates article I, section 7.

The "consent" purportedly required by the condition is not sufficient to establish an exception to the warrant requirement. A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given. State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998). Countryman does not have the option of refusing to consent to a warrantless search. At sentencing, the condition was imposed on him without any agreement on his part or indeed without any discussion whatsoever. 2RP 5-8. Therefore, the "consent" exception to the warrant requirement does not apply.

The condition also violates the Fourth Amendment. A search of a parolee without reasonable cause violates the Fourth Amendment where there is no state law that requires a parolee to agree to suspicionless searches. United States v. Freeman, 479 F.3d 743, 747-48 (10th Cir. 2007). In Samson v. California, the United States Supreme Court upheld a suspicionless search of a parolee by a law enforcement officer, but the search was expressly authorized by a California State law that required parolees to agree to searches without cause as a condition of parole. Samson v. California, 547 U.S. 843, 846, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006). In Freeman, the Tenth Circuit explained that parolee searches are an example "of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law."

Freeman, 479 F.3d at 747-48. Under Samson, suspicionless searches of parolees are constitutional "only when authorized under state law." Id. at 748.

Washington constitutional and statutory law does not authorize suspicionless searches of a supervised person's home. Winterstein, 167 Wn.2d at 628-29; RCW 9.94A.631(1). Community corrections officers must have "reasonable cause" before conducting a warrantless search. There is no comparable law that requires those being supervised to agree to a suspicionless search. As a result, the suspicionless search condition violates the Fourth Amendment as well as article I, section 7. The condition should be modified to include a reasonable cause requirement.

b. The challenge is ripe for review.

In State v. Massey, the Court of Appeals held a challenge to a community custody condition that did not state the search must be based upon reasonable cause was not ripe for review because it had not yet been enforced. State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). Massey is no longer good law.⁷

⁷ Challenge to the same condition at issue here is currently pending before the Supreme Court in State v. Cates, No. 89965-7. The issue in Cates is described as follows: "Whether a condition of community custody requiring an offender to 'consent' to searches of his residence to ensure his compliance with conditions of supervision is reviewable while the offender is still incarcerated, and if so, whether the condition

"Courts routinely entertain pre-enforcement challenges to sentencing conditions." State v. McWilliams, 177 Wn. App. 139, 153, 311 P.3d 584 (2013), review denied, 179 Wn.2d 1020, 318 P.3d 279 (2014). "Pre-enforcement challenges to community custody conditions are ripe for review when the issue raised is primarily legal, further factual development is not required, and the challenged action is final." McWilliams, 177 Wn. App. at 153 (citing Sanchez Valencia, 169 Wn.2d at 789).

The community custody challenge in Countryman's case is ripe. The issue is primarily legal: does the sentencing court have the constitutional authority to impose the condition that Countryman submit to suspicionless searches of his home? If the condition is unconstitutional as written, time will not cure the problem. The condition was unconstitutional when it was first imposed as part of the sentence and it remains just as unconstitutional today.

Second, this question is not fact-dependent. Generally, the question of the constitutionality of a community custody condition is purely legal and requires no further factual development. Bahl, 164 Wn.2d

unconstitutionally allows the offender's residence to be searched without reasonable cause to believe he has violated sentencing conditions." http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2014Sep (last accessed April 27, 2015). Oral argument in Cates took place on September 30, 2014.

at 748. The issue does not require further factual development because this constitutional question does not depend on the particular circumstances of the attempted enforcement. Either the condition as written is constitutional or it is not. Sanchez Valencia, 169 Wn.2d at 789.

Third, the challenged condition is final because Countryman has been sentenced under the condition at issue. Id.

Reviewing courts must also consider the hardship to the parties of withholding court consideration. Id. at 786. Preenforcement review "helps prevent hardship on the defendant, who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis." Bahl, 164 Wn.2d at 751.

Here, the condition requires Countryman to "consent" to suspicionless searches by his community corrections officer. CP 118. If he refuses, he is subject to immediate arrest and jail. See RCW 9.94A.631(1) ("If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department."). Countryman should not have to wait until that occurs before he is able to challenge the constitutionality of the condition.

Countryman's challenge to the community custody condition is ripe for review. It requires no further factual development to decide and he should not be required to refuse to comply with the condition, subjecting himself to arrest and jail, before he may challenge it.

D. CONCLUSION

For the reasons set forth, Countryman requests reversal of the revocation order and remand for a new hearing before a different judge. In the event this Court declines to do so, then the challenged conditions of community custody should be stricken or modified.

DATED this 15th day of June 2015

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72752-4-I
)	
JUSTIN COUNTRYMAN,)	
)	
Appellant.)	

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 15TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUSTIN COUNTRYMAN
DOC NO. 306902
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JUNE 2015.

X *Patrick Mayovsky*