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Court of Appeals
Division III
State of Washington

32806-6-III
(consolidated with No. 32903-8-III)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL DUKE COOMBES, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a 36 month term of community custody.
2. The trial court erred by imposing a community custody condition prohibiting Mr. Coombes from having any association or contact with gang members or their associates.
3. The judgment and sentence contains an omission that should be corrected - it does not indicate that Mr. Coombes used a firearm in the commission of the offense, as found by the jury.

II. ISSUES PRESENTED

1. Should this court remand to the superior court to amend the judgment and sentence to indicate the correct term of community custody?
2. Is there a tenable reason for the sentencing court's order that the appellant have no association with gangs?
3. Should this court remand to the superior court to amend the judgment and sentence to make a finding regarding the jury's determination that the appellant used a firearm during the commission of the murder?

III. STATEMENT OF THE CASE

The State accepts the appellant's statement of the facts for this appeal only.

IV. ARGUMENT

A. THE SENTENCING COURT DID NOT ORDER THE CORRECT TERM OF COMMUNITY CUSTODY UNDER FORMER RCW 9.94A.715 (1) AND FORMER WAC 437-20-010

The appellant appropriately claims the superior court imposed the incorrect term of community custody. At the time of sentencing in 2014, the superior court ordered the appellant to a term of 36 months of community custody, presumably under the current form of the statute, RCW 9.94A.701(1)(b). The court should have ordered a term of 24 to 48 months, or up to the period of earned release, whichever is longer, because the petitioner's crime occurred in the calendar year 2007. Former RCW 9.94A.715 (1)¹.

¹ This statute provided that the court shall "sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer." RCW 9.94A.715(1). *See also* former WAC 437-20-010, superseded by section 5, chapter 235, Laws of 2009 (24-48 months presumptive range of community custody for serious violent offenses). Murder in the first degree is a serious violent offense. Former RCW 9.94A.030(41)(a).

The respondent agrees with the appellant and requests this court remand to the superior court to amend the judgment and sentence to reflect the appropriate term of community custody.

B. THE SENTENCING COURT HAD TENABLE GROUNDS TO IMPOSE THE GANG-RELATED PROHIBITION

This court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *State v. Crockett*, 118 Wn. App. 853, 856, 78 P.3d 658 (2003). An abuse of discretion occurs when “no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); *State v. DeLeon*, 341 P.3d 315, 328 (Wn. App. Div. 3, 2014). Stated differently, a court also abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), *State v. DeLeon*, 341 P.3d at 328.

The appellant argues the condition contained in § 4.2(C)(2) of the judgment and sentence restricting his association or contact with gang members or their associates is not supported by the evidence produced at the time of trial.

Former RCW 9.94A.700(5),² recodified as RCW 9.94A.703(3), and again as RCW 9.95B.050(4), permitted a sentencing court to impose any or all of the following conditions of community custody:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

Crime-related prohibitions allow the sentencing court to prohibit conduct that relates directly to the circumstances of the crime for which the offender has been convicted. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), *abrogated on other grounds*, *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). No causal link need be established between the condition imposed and the crime committed, so long as the

² See, RCW 9.94A.345 (sentence imposed under Sentencing Reform Act shall be determined in accordance with law in effect when offense was committed). RCW 9.94A.700(5) was in effect at the time of the appellant's sentencing.

condition relates to the circumstances of the crime. *State v. Llamas–Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992).

Accordingly, an offender's usual freedom of association may be restricted if the restriction is reasonably necessary to accomplish the needs of the State and public order. *State v. Riley*, 121 Wn.2d at 37–38; *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974); *State v. Bobenhouse*, 143 Wn. App. 315, 332, 177 P.3d 209 (2008), *aff'd*, 166 Wn.2d 881 (2009). There is no requirement that a condition imposed under the statute be crime related. *Llamas–Villa*, 67 Wn. App. at 448 (citing former RCW 9.94A.120(8) (1988)).

The philosophy underlying the ‘crime-related’ provision is that “[p]ersons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them.” *Riley*, 121 Wn.2d at 36–37.

At the time of trial, the following testimony was produced from a Spokane police detective regarding the appellant’s pretrial statements to law enforcement about the commission of the murder:

Q: ...And what did Mr. Coombes tell you next about Mr. Nichols [-the victim]?

A: He told us that Mr. Nichols, whom he described as Red, had been arguing with Mr. Coombes' nephew, Chris. He

told us at the time at that residence while this was going on, there was an individual named Jerry, someone named Jack, Chris and then Mr. Coombes, as well as Red. During the arguments between Chris and Red, or Mr. Nichols, Chris had hit Mr. Nichols in the head after throwing an empty beer can at him.

Q: What did Mr. Coombes say happened after that?

A: He told us that Red, or Mr. Nichols, had walked over to Mr. Coombes and stated, quote, "You keep that fucker away from me or I'll stab him."

Q: Stab who?

A: And he was referring to his -- that Red was telling Mr. Coombes to keep Chris, Mr. Coombes' nephew, away from Red, or Mr. Nichols.

Q: What did he say next?

A: Mr. Coombes told us that at one point, *Red had threatened Mr. Coombes by saying he knew some gypsy jokers that would take care of them*, and then he told us he -- [(Italics added)].

MR. COMPTON: Objection. Your Honor, can we approach on this?

THE COURT: Yes.

(BENCH CONFERENCE HELD.)

MR. COMPTON: *My objection is the next words out of the detective's mouth is going to be about Mr. Coombes' gang affiliation, which he claims to have some Aryan connection.* [(Italics added)].

THE COURT: Is this going to be part of his statements as threats, but not the detective did not write any statements that he --

MR. TREECE: I'm sorry, Your Honor. I thought we went over this in the 3.5. This is after he had been Mirandized.

THE COURT: Right, but when we specifically talked about gang affiliation; I didn't hear the statement come out at the 3.5 hearing this was the specific statement.

So I would skip over this because we ruled on that.

RP 603-04 (12/15/2011).

Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Accordingly, the sentencing court could reasonably infer from these facts, although not argued as a theory of the State's case, that the murder may have been committed, in part, because of the defendant and victim's relative gang associations and potential ill-will between the two. In addition, it was alleged that the victim previously threatened the defendant with his claimed gang affiliation.

The superior court did not err when it imposed the sentencing condition that Appellant have no contact or association with gang members.

C. THE SENTENCING COURT DID NOT MAKE A FINDING THAT THE JURY FOUND THE APPELLANT USED A FIREARM DURING THE COMMISSION OF THE OFFENSE, AND REMAND IS APPROPRIATE TO ALLOW THE SENTENCING COURT TO DO SO

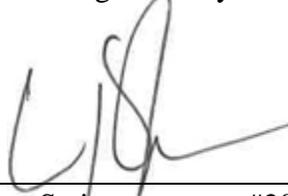
The appellant requests this court remand to the superior court to enter an order amending the judgment and sentence to reflect the jury's finding that the appellant used a firearm during the commission of the murder under count I of the Information. CP 104. The respondent joins that request as there is not a notation in the judgment and sentence reflecting the jury's factual determination regarding the use of a firearm during the commission of the murder, even though the jury did make that determination by special verdict as indicated in this court's unpublished opinion, *State v. Coombes*, 2013 WL 3148180 (2013); CP 104.

V. CONCLUSION

The respondent asks this court grant the relief as requested above.

Dated this 14 day of April, 2015.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 14, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kristina M. Nichols
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and mailed a copy to:

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4/14/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)