

FILED
Dec. 18, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 30310-1-III
)	
Respondent,)	
)	
v.)	
)	
BRUCE LAWRENCE AUSTIN,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Brown, J. • Bruce L. Austin appeals his sentence for two counts of possession of child pornography. He contends, and the State aptly concedes, one community custody condition concerning alcohol was not related to his offenses. In his statement of additional grounds for review (SAG), Mr. Austin contends he was denied effective assistance of counsel but relies on facts outside our record; thus, his claim fails. Accordingly, we vacate the challenged alcohol-related prohibitions and remand for correction of his sentence.

FACTS

The State charged Mr. Austin with first degree rape of a child, first degree child

molestation, and two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct. Following a bench trial, Mr. Austin was found guilty of two counts of first degree possession and not guilty of the other charges. The court sentenced him to 102 months' confinement and 36 months of community custody. While on community custody, the court restricted Mr. Austin from "purchasing, possession or consuming alcohol." Clerk's Papers at 38. He appeals.

ANALYSIS

A. Community Custody Condition

The issue is whether it was lawful for the court to prohibit Mr. Austin from possessing and purchasing alcohol as a condition of his community custody. Mr. Austin contends the sentencing court erroneously prohibited him from possessing and purchasing alcohol because there is no showing that his crimes are alcohol related.¹ The State agrees; we accept the State's concession.

A defendant may raise objections to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). A trial court may require an offender to "comply with any crime-related prohibitions" as a condition of community custody. RCW 9.94B.050(5)(e). A "[c]rime-related prohibition" is "an

¹ Mr. Austin does not challenge the condition prohibiting him from consuming alcohol while on community custody supervision. Such a condition is lawful even if alcohol did not contribute to the offense. *Jones*, 118 Wn. App. at 206.

No. 30310-1-III
State v. Austin

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). We review crime-related conditions for abuse of discretion, and will reverse a condition if it is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Because possessing and purchasing alcohol does not directly relate to the crime of possession of child pornography, we vacate the challenged alcohol-related community custody condition and remand for sentence correction to solely permit restriction of alcohol consumption.

B. SAG

In his SAG, Mr. Austin contends he was denied effective assistance of counsel because his attorney did not advise him about the laws regarding unit of prosecution. He argues his two counts of possession of child pornography could have been prosecuted as one unit of prosecution.

To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to establish either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). First, he must show that counsel’s representation fell below an objective standard of reasonableness. *Id.* Second, he must show that the deficient performance was prejudicial. *Id.* at 78. Prejudice occurs when it is reasonably probable that but for

counsel's errors "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Mr. Austin stipulated that several images found on his computer depicted minors engaged in sexually explicit conduct. He argues he would not have stipulated had he been correctly informed about unit of prosecution. But, what defense counsel did or did not advise Mr. Austin is not in our record. If Mr. Austin has information outside our record, his proper recourse is a personal restraint petition. *McFarland*, 127 Wn.2d at 335. Accordingly, his ineffective assistance of counsel claim fails.

Remanded for sentencing correction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Brown, J.

Korsmo, C.J.

Kulik, J.