IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61996-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JORGE ADRIAN CRESPO-ORTIZ,	)	Unpublished Opinion
	)	
Appellant.	)	Filed: November 30, 2009

Lau, J. — A jury convicted Jorge Crespo-Ortiz of second degree child rape involving his niece. He challenges several sentence conditions. First, he argues that a community custody condition prohibiting him from unsupervised contacts with minors violates his fundamental right to parent his daughter. We disagree and affirm the condition because it is reasonably related to his crime. Second, he objects to a community custody condition requiring him to obtain a substance abuse evaluation and follow any recommended treatment. He argues there is no evidence controlled substances—as opposed to alcohol—contributed to his offense. We agree that the condition is overly broad and remand with instructions to limit the condition to alcohol evaluation and treatment. Third, he challenges the court's imposition of a DNA (deoxyribonucleic acid) collection fee on the ground that the savings statute, RCW

10.01.040, required the court to apply a different version of the fee statute. But this argument is undermined by our recent decision in State v. Brewster, No. 62764-3, 2009 WL 3418161 (Oct. 26, 2009), so we affirm the fee imposition. Finally, he makes additional arguments in a pro se statement of additional grounds, but we conclude they are without merit. Accordingly, we remand for modification of the substance abuse condition and affirm in all other respects.

FACTS

The State charged Crespo-Ortiz with raping his 12-year-old niece, M.D. At trial, M.D. testified that she was alone in the laundry room when her uncle entered the room, pulled down her pants, and pushed her on a table. According to M.D., they had sex for several minutes before a house guest interrupted them. M.D.'s mother, Angela, testified that when the guest informed her of the incident, she immediately took M.D. to the hospital. An examination revealed a laceration at the base of the vaginal opening consistent with penetration. M.D. also testified that Crespo-Ortiz had been drinking alcohol on the day of the incident.

The next day, Detective Chris Knudsen arrested Crespo-Ortiz at his workplace and took him to the Kent Regional Justice Center. Once there, Spanish-speaking detectives interviewed Crespo-Ortiz after he waived his Miranda[1] rights. In the interview, he told Detective Knudsen that he had been "really drunk" the day before. Report of Proceedings (RP) (May 19, 2008, afternoon) at 38. He also admitted having sex with M.D. Subsequent testing revealed the presence of M.D.'s DNA on his penis.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The jury convicted Crespo-Ortiz of one count of second-degree child rape.

At sentencing, defense counsel requested a SSOSA (special sex offender sentencing alternative) under RCW 9.94A.670, arguing that Crespo-Ortiz should be given the opportunity for sex offender treatment. The court denied the request after reviewing the defense presentence report and attached sexual deviancy evaluation.[2] The court stated, "[T]he words that jumped out at me from the evaluation is where he does not accept accountability for his sexual behavior." Report of Proceedings (RP) (July 11, 2008) at 5. The court agreed that "he never really has [taken accountability for his sexual behavior], he has admitted it, but he blames both his drinking and the victim for it, to date." RP (July 11, 2008) at 14. The court also noted that the evaluator indicated that his alcohol abuse would be an obstacle to treatment and that he was at "moderate risk" for reoffending even if he remained "substance free." RP (July 11, 2008) at 13–14. Finally, the court stated that Crespo-Ortiz would need close supervision "to make sure there wasn't a repetition of this sexual misbehavior. With this particular victim or any other." RP (July 11, 2008) at 14.

The court imposed a standard range minimum term indeterminate sentence of 90 months. It ordered him not to have contact with minors without supervision of a responsible adult with knowledge of his conviction. However, it also provided an exception if his community corrections officer determined it safe to lift the restriction, and it provided that he could have phone and letter contact with his minor daughter while in custody. Additionally, the court ordered Crespo-Ortiz to obtain a substance abuse

[2] The evaluation itself is not part of the record on appeal.

evaluation and follow all treatment recommendations. And it imposed a $100 DNA collection fee, finding the fee to be mandatory under the applicable version of RCW 43.43.7541. Crespo-Ortiz appeals.

ANALYSIS

Unsupervised Contact with Minors

The trial court imposed the condition restricting Crespo-Ortiz's contact with minors under RCW 9.94A.505(8), which authorizes "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(13). Crespo-Ortiz challenges the condition because it limits his contact with his daughter. He contends this restriction violates his fundamental parental rights.

An appellate court reviews the imposition of crime-related prohibitions for an abuse of discretion. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). Such conditions are usually upheld if reasonably crime related. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). But "[m]ore careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right." Warren, 165 Wn.2d at 32. Parents have such a right with respect to the care, custody, and control of their children. Ancira, 107 Wn. App. at 653. Nevertheless, in criminal sentencing, a court may impose limits on this right "when reasonably necessary to further the State's compelling interest in protecting children."

State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). Thus, the issue here is whether the prohibition on unsupervised contacts with minors is reasonably necessary to protect children—including Crespo-Ortiz's daughter—from harm.

Crespo-Ortiz argues that it is not because there was no evidence he abused his own daughter. He relies on State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000). There, Letourneau was convicted for having sex with one of her 13-year-old students. Letourneau's evaluators were unanimous in concluding she was not a pedophile. This court concluded there was insufficient evidence that a restriction on Letourneau's contact with her biological children was necessary to prevent her from molesting them. Letourneau, 100 Wn. App. at 442.

This case is distinguishable from Letourneau. Here, the sexual deviancy evaluator stated Crespo-Ortiz was at moderate risk of reoffending and he did not limit that risk to M.D. The evaluator also noted that Crespo-Ortiz's alcohol abuse would pose a challenge to his treatment, a factor not present in Letourneau. Additionally, whereas Letourneau's victim was unrelated, Crespo-Ortiz was convicted of raping a close family member—his niece. Considering this evidence, the trial court's restrictions on Crespo-Ortiz's unsupervised contact with all minors was a reasonable condition related to his crime and the court did not abuse its discretion.[3]

Substance Abuse Evaluation

[3] We also note that the trial court appropriately tailored the prohibition to Crespo-Ortiz's situation by permitting him to have phone and mail contact with his daughter (who lives in Mexico) while in custody and providing his community corrections officer the ability to lift the condition under certain circumstances.

Crespo-Ortiz also contends the trial court acted beyond its statutory authority in requiring him to undergo a substance abuse evaluation and any recommended treatment as part of his community custody sentence. Under former RCW 9.94A.700(5)(c) (2007), the court had authority to impose a condition that Crespo-Ortiz "participate in crime-related treatment or counseling services."[4] And under former RCW 9.94A.712(6)(a)(i) (2007), the court had authority to order that he "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, [his] risk of reoffending, or the safety of the community . . . ." But when a court orders an evaluation and treatment under these provisions, the 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) (holding that a sentencing court erred in ordering alcohol counseling when the evidence showed that methamphetamines, but not alcohol, contributed to the offense).

Crespo-Ortiz argues that the substance abuse condition is overly broad because there is no evidence that controlled substances contributed to his offense. We agree. The record shows that Crespo-Ortiz was drinking alcohol on the day of the incident, but there is nothing in the record to indicate drugs were involved.[5] Under the Sentencing Reform Act's sentencing scheme, a substance abuse evaluation and treatment condition

[4] Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345. The date of the offense here was April 1, 2007.

[5] The State refers to comments at the sentencing hearing referencing Crespo-Ortiz's "substance abuse" problems and the importance of him staying "substance free," but it is clear from our review of the record that these references are limited to alcohol.

can be imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant's crime. Accordingly, we remand for resentencing with instructions to limit the condition to alcohol evaluation and treatment.

DNA Collection Fee

The trial court imposed a $100 DNA collection fee on Crespo-Ortiz, finding the fee to be mandatory under RCW 43.43.7541. When he was sentenced, this statute provided, "Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (2008). Crespo-Ortiz contends the trial court erred in applying this version of the statute. He argues the version in effect at the time of his offense—not at the time of his sentencing—should govern. The prior version did not mandate the fee.

> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2006) (emphasis added).

Crespo-Ortiz's argument rests on the general criminal prosecution savings statute, RCW 10.01.040. This statute provides that criminal cases must be decided according to the law in effect at the time the offense is committed unless the legislature expresses a clear intent to affect pending prosecutions.

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act . . . .

RCW 10.01.040. The parties dispute whether the legislature's 2008 amendment to RCW 43.43.7541 expressed a clear intent to make the DNA collection fee mandatory for pending cases. But it is unnecessary to reach this issue because the savings statute does not apply here.

The savings statute applies only to criminal and penal statutes. RCW 10.01.040; State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000). Its function is to "save" offenses already committed and penalties or forfeitures already incurred from the consequences of amendment or repeal. State v. Kane, 101 Wn. App. 607, 610, 5 P.3d 741 (2000). The terms "penalty" and "forfeiture" in the savings statute are synonymous with "punishment." Brewster, 2009 WL 3418161, at *2; see also Warden v. Marrero, 417 U.S. 653, 660–63, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974) (equating the terms "penalty" and "forfeiture" in federal savings statute with the term "punishment" and concluding that no-parole provision was part of an offender's "punishment."). Thus, the threshold issue here is whether the DNA collection fee is part of Crespo-Ortiz's "punishment."

In our recent decision in Brewster, we concluded that the DNA collection fee is not punitive. We emphasized that the fee's purpose is not punishment, but rather to fund maintenance and operation of DNA databases.

> The legislature has repeatedly found that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigation or prosecution, and in detecting recidivist acts. The databases also facilitate the identification of missing persons and unidentified human remains. These are not punitive purposes.

Brewster, 2009 WL 3418161, at *2. We noted that the amount of the fee is fixed and does not depend on the severity of the offense. Finally, we observed that other legal financial

obligations have not been regarded as punishment.

Because the savings statute does not apply here, the general common law rule requiring pending cases to be decided according to the law in effect "'at the time of the decision'" governs. State v. Kane, 101 Wn. App. 607, 611, 5 P.3d 741 (2000) (quoting State v. Zornes, 78 Wn.2d 9, 12, 475 P.2d 109 (1970)). Accordingly, the trial court did not err in applying the 2008 version of the DNA fee collection statute in effect at the time of Crespo-Ortiz's sentencing.[6]

Pro Se Arguments

Crespo-Ortiz makes several additional arguments in a pro se statement of additional grounds. First, he contends the trial court erred by not suppressing his statements to detectives at the Kent Regional Justice Center. He asserts that he was intoxicated from drinking the day before the interview such that he could not knowingly and voluntarily waive his right to silence and that the detectives were overbearing, making his statements involuntary. But at the CrR 3.5 hearing, the court found that Crespo-Ortiz was not intoxicated when he spoke to police. The court also found that Crespo-Ortiz understood the Miranda warnings, which were read to him in Spanish, and that the detectives did not coerce him into making a statement. There is substantial evidence to support these findings based on the detectives' testimony.

[6] Because Crespo-Ortiz's argument is flawed, we also conclude that his attorney's performance was not deficient based on her failure to make the argument. We also decline to address the other arguments Crespo-Ortiz makes concerning the DNA fee because they were not timely raised. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Second, Crespo-Ortiz contends his trial counsel provided ineffective assistance because she did not call an expert to the CrR 3.5 hearing to testify about the rate at which the intoxicating effects of alcohol dissipate over time. But to demonstrate ineffective assistance, Crespo-Ortiz must show that his attorney's performance was deficient and that it resulted in prejudice, such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If Crespo-Ortiz fails to satisfy either prong, the court need not address the other prong. Hendrickson, 129 Wn.2d at 78. Here, Crespo-Ortiz fails to demonstrate prejudice. It is not clear that an expert would have testified as Crespo-Ortiz now conjectures or whether such testimony would have led the trial court to suppress his statements. Moreover, considering the witness statements and evidence showing M.D.'s DNA on Crespo-Ortiz's penis, there is not a reasonable probability that the outcome of the trial would have been different without the admission of his statements.

Third, Crespo-Ortiz contends his right to a fair trial was violated when the State characterized his statements as a confession. He argues that the detectives interrogated him using inept Spanish, resulting in confusion during the interview, not a true confession. But the transcript of the interview, read at trial, contains what can fairly be characterized as a confession.

> Detective Cleary asks: "Were you at the half of having sex with her or were you finished?" He says: "No, in the beginning. We were starting, and, and, she saw me, we put our pants on." So, Detective Cleary says: "So you took your penis from her vagina?" He says: "Yes, we put our pants on." And, she says: "Yes or no?" He says: "Yes." She says: You took your penis out?" And he says: "Yes. Yes. Yes." She says: "Okay." [He] says: "I didn't want to. At no time did I have penetration like - - like having finished. Having finished - - having finished.

> Finished inside her." Detective Clearly says: "Okay. But you went in, you had penetration?" He says: "Hmm." She says: "Yes, you did, didn't you?" And he says: "Yes."

RP (May 19, 2008) (afternoon) at 25–26. Crespo-Ortiz's argument is without merit.

Fourth, Crespo-Ortiz contends the trial court erred by allowing the State to elicit testimony to suggest he had a lustful disposition toward M.D. But "evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition" because such evidence makes it more probable the defendant committed the offense charged. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Here, there were allegations of prior sexual contacts between Crespo-Ortiz and M.D., tending to show he had a lustful disposition toward her. The evidence was admissible to show it was more probable that he committed the offense at issue. Crespo-Ortiz argues that the probative value of this evidence was outweighed by its prejudicial effect, but this determination is

reserved to the sound discretion of the trial court. State v. Suttle, 61 Wn. App. 703, 812 P.2d 119 (1991). Crespo-Ortiz does not show that the trial court abused its discretion.

Fifth, Crespo-Ortiz contends the trial court erred by refusing to grant his request for a different attorney. The court reviews a denial of a motion to substitute counsel for an abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Here, when Crespo-Ortiz requested new counsel, he said his attorney was scaring him and telling him he would go to jail for a long time. The court responded, "What I am hearing thus far is that the defendant does not like what Ms. Pollock is telling him. I dare say he

does not like the situation that he's in. Based on what has been communicated to this court, it does not justify substitution of counsel, and therefore your motion is denied." RP (Feb. 15, 2008) at 7. This was not an abuse of discretion.

Sixth, Crespo-Ortiz contends the court erred when it refused to sentence him under the SSOSA. The refusal to order a SSOSA is reviewed for an abuse of discretion. State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345 (1997). Here, the court gave several reasons for denying Crespo-Ortiz's request, including a lack of family support, a general lack of stability, and what the court perceived as an unwillingness to take responsibility for his actions—"he never really has [taken accountability for his sexual behavior], he has admitted it, but he blames both his drinking and the victim for it, to date." RP (July 11, 2008) at 14. The court also noted that he was subject to deportation, which could pose additional obstacles to sex offender treatment.[7] The court did not abuse its discretion.

Finally, Crespo-Ortiz contends that cumulative error denied him a fair trial. "The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." State v. Hodges, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). The defendant bears the burden of proving he was prejudiced by the accumulation of errors. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005). Here, Crespo-Ortiz's cumulative error argument fails because he has not demonstrated any error.

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[7] Crespo-Ortiz contends this rationale constitutes an equal protection violation because he should not be treated differently than non-aliens. But to the extent that his immigration status undermines the probability of successful treatment under SOSSA, he is not similarly situated to those who did not face deportation. Consequently, his equal protection argument fails. State v. Handley, 115 Wn.2d 275, 289–90, 796 P.2d 1266 (1990).

In conclusion, we remand with instructions for the trial court to modify the substance abuse condition so that it is limited to alcohol evaluation and treatment. In all other respects, we affirm.

WE CONCUR: