

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

STATE OF WASHINGTON,)	No. 65916-2-1
)	
Respondent/Cross-Appellant,)	
v.)	UNPUBLISHED OPINION
)	
BRIAN KEITH ENGLISH,)	
)	
<u>Appellant/Cross-Respondent.</u>)	FILED: January 30, 2012

Schindler, J. — Brian Keith English was convicted by a jury of possession of methamphetamine. The court imposed a term of incarceration to be followed by 12 months of community custody. As a condition of community custody, the court authorized electronic monitoring through the use of a global positioning satellite (GPS) tracking device. English argues that GPS monitoring is neither a proper crime-related condition of community custody, nor does the record support the imposition of GPS tracking as a means to monitor any other court-imposed condition. We agree and remand to strike the condition.

FACTS

On January 20, 2010, a police officer noticed Brian Keith English and a female walking down an Everett street. The officer approached English, grabbed his hand,

and told English he was under arrest for an outstanding warrant.¹ English jerked his hand away and fled. The officer pursued English. English ran into an alley and then into the back yard of a residence bordering the alley. The officer saw English drop the backpack he was carrying in the back yard and then run through the side yard of the residence, through the front yard. English was eventually apprehended in the back yard of a neighboring residence. Police officers were unable to find the backpack, but did find several small baggies of methamphetamine along the route English took during his attempt to escape arrest.

English was charged with possession of a controlled substance while on community custody. The jury found him guilty.

At sentencing, the parties agreed that English had an offender score of 11. The State recommended a mid-range sentence of 18 months. The State explained that it would normally recommend the maximum sentence within the sentencing range based on an offender score of 11, but did not do so in this case because the majority of English's convictions were for "status offenses" based on his failure to register as a sex offender. Based on the recommendation of English's Community Corrections Officer (CCO), the State also asked the court to impose a chemical dependency evaluation and treatment to address English's "chemical dependency issues."

At the time of sentencing, English was subject to electronic monitoring with a GPS tracking device which was scheduled to be removed a few weeks after the

¹ The warrant apparently issued because of English's failure to report to his Community Corrections Officer.

sentencing hearing.² The prosecutor told the court that according to English's CCO, GPS monitoring was a "good thing" for English because he was often homeless and difficult to supervise. Noting that the Department of Corrections (DOC) has express statutory authority to impose electronic monitoring as a condition of community custody only for those convicted of sex offenses, the State requested that the court impose a condition authorizing GPS monitoring during English's term of community custody.³

The defense agreed with the recommendation to impose a mid-range sentence and had "no objection" to a condition to require English to obtain a drug dependency evaluation and treatment, observing that English's criminal history was largely the result of the "circular effect of substance abuse and homelessness." English also acknowledged he had a "drug problem" for which he had not had "really any treatment to think of."

The court imposed a mid-range sentence. In addition, the court ordered English to participate in a "chemical dependency evaluation" and to "fully comply with all recommended treatment." The court checked a separate box stating: "The defendant shall comply with the following crime-related prohibitions," and interlineated that English's "CCO may place a G.P.S. device on the defendant at his (CCO's) discretion."

ANALYSIS

² It appears that English was subject to electronic monitoring because he was being supervised by the Department of Corrections on multiple causes for failure to register as a sex offender.

³ See RCW 9.94A.704(5) ("If the offender was sentenced pursuant to a conviction for a sex offense, the department may impose electronic monitoring.").

For the first time on appeal, English contends that the trial court had no authority to authorize GPS monitoring because the condition bears no relationship to the crime of possession of a controlled substance, nor does it relate to the specific circumstances of his crime.⁴ Although English did not object to the community custody condition below, because he contends that the court lacked statutory authority to impose the condition, we can address his claim for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (sentence imposed without statutory authority can be raised for the first time on appeal).

“A trial court may impose only a sentence which is authorized by statute.” State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Because it is solely the legislature's province to fix legal punishments, a proper community custody condition must be authorized by the legislature. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009).

In general, conditions that do not reasonably relate to the circumstances of the crime are unlawful unless specifically permitted by statute. Jones, 118 Wn. App. at 205. We generally review the imposition of a crime-related prohibition for an abuse of discretion. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, the issue of whether the trial court exceeded its statutory authority in imposing community custody conditions is reviewed de novo. Armendariz, 160 Wn.2d at 110;

⁴ The State does not argue that English's challenge is not ripe, and for purposes of this appeal, we assume without deciding that it is. State v. Sanchez Valencia, 169 Wn.2d 782, 786, 790–91, 239 P.3d 1059 (2010) (claim is ripe for appeal if the issues raised are primarily legal, they do not require further factual development, the challenged action is final, and the defendant is burdened by the condition without further action by the State).

State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007).

Under the Sentencing Reform Act (SRA) of 1981, chapter 9.94A RCW, conditions of community custody may include “crime-related treatment or counseling services;” participation in “rehabilitative programs” or other “affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;” and compliance with “crime-related prohibitions.” RCW 9.94A.703(3)(c), (d), (f); Kolesnik, 146 Wn. App. at 807. A crime-related condition prohibits conduct that “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Additional conditions may be imposed to monitor or ensure compliance with crime-related sentencing conditions. RCW 9.94A.030(10) (“affirmative acts necessary to monitor compliance with the order of a court may be required by [DOC]”).

The State does not argue that GPS monitoring is related to the circumstances of the crime of methamphetamine possession. Rather, the State asserts that, like polygraph testing, GPS tracking serves a monitoring purpose and was properly ordered to monitor compliance with other court-imposed conditions. In support of this argument, the State relies on State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998). Riles does not support the State’s argument.

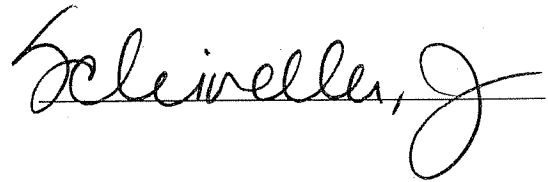
In Riles, the defendants in the two consolidated cases were convicted of sex offenses. They challenged conditions of community placement requiring submission to polygraphs and plethysmograph testing. The version of the SRA in effect at the time of

the defendants' crimes provided that crime-related conditions could not include orders directing an offender to participate in rehabilitative or other affirmative conduct.⁵ The defendants argued that the conditions impermissibly required affirmative conduct and were not crime-related conditions. Riles, 135 Wn.2d at 329-31. The court considered the purposes of the SRA to "protect the public and to offer the offender an opportunity for self-improvement," and subsequent amendments to the SRA confirming the legislature's intent to allow conditions requiring affirmative acts necessary to monitor compliance with sentencing conditions. Riles, 135 Wn.2d at 341, 342-43. The court concluded that imposition of monitoring conditions was permissible. Riles, 135 Wn.2d at 342-43.

The court then considered whether polygraph and plethysmograph testing were properly imposed as monitoring conditions. Based on the "validity" of polygraph testing as an investigative tool, and because "polygraph testing on sex offenders" was "consistent" with regulatory guidelines for monitoring use in sex offender treatment, the court upheld imposition of polygraph testing. Riles, 135 Wn.2d at 342. But the court concluded that the evidence did not support the imposition of plethysmograph testing as a monitoring tool because evidence supported its use only for purposes of assessment and treatment of sex offenders. Riles, 135 Wn.2d at 344-46. Therefore, the court concluded that plethysmograph testing could be ordered only in conjunction with crime-related sex offender treatment. Riles, 135 Wn.2d at 345.

⁵ The SRA in effect at the time did not include the language it now contains expressly authorizing imposition of "affirmative acts necessary to monitor compliance" with court-ordered conditions of community custody and conditions which require affirmative conduct related to the crime, risk of reoffense, or public safety. See RCW 9.94A.030(10); RCW 9.94A.703(3)(d).

The State contends that the GPS monitoring condition imposed here is likewise a “necessary tool” to enforce the court’s imposition of a chemical dependency evaluation and treatment. However, the record in this case reveals no connection between the drug treatment conditions imposed and the authorization of GPS monitoring. There was no argument or evidence presented that GPS monitoring would ensure or facilitate English’s compliance with the drug dependency evaluation or treatment. Instead, it is clear from the record that the recommendation to allow GPS tracking was solely based on the fact that English was homeless and difficult to supervise in the community. The court’s order contains no indication that the GPS tracking was imposed in order to monitor English’s compliance with drug treatment. Unlike in Riles, the record reveals no nexus between the purported monitoring condition and a lawfully imposed crime-related custody condition. Therefore, we remand to permit the trial court to strike the invalid condition.



WE CONCUR:

