IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66846-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
Gregory P. Miller,)		UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 6, 2012

Spearman, A.C.J. — Gregory Miller was convicted of second degree rape. On appeal, Miller challenges seven conditions of his community custody, including five drug and alcohol-related conditions, and the requirements that he undergo plethysmograph testing and pay the victim's costs of crime-related counseling and medical treatment.

The community custody condition requiring Miller to submit to plethysmograph testing is valid because he was ordered to enter sexual deviancy treatment. The conditions regarding drugs and alcohol, however, are invalid because drugs and alcohol were not directly related to the circumstances of Miller's crime. Additionally, the condition requiring Miller to pay the costs of crime-related counseling and medical treatment is not statutorily authorized and

is therefore invalid. We remand with instructions to strike the community custody conditions specified herein, but otherwise affirm.

FACTS

Gregory Miller met K.W. sometime between 1998 and 1999. The two were in fairly regular contact from that time until 2008. Miller's wife, Jacinda, stayed with K.W. for about two months around December 2007 while she and Miller were separated. Jacinda and Miller reconciled and she moved back in with him. On September 2, 2008, Miller went to K.W.'s apartment to pick up some of Jacinda's belongings. After getting Jacinda's property out of a downstairs closet and an outside storage shed, K.W. went to the upstairs bedroom to retrieve the last of Jacinda's belongings. Miller followed her into the bedroom and raped her.

Miller was charged with second degree rape. The case proceeded to trial on November 12-18, 2010. At trial, Miller testified that he and K.W. had kissed a few days before the alleged rape. They had attended a party the Saturday before and after leaving the party the two talked on K.W.'s porch while smoking. After a short while, the two kissed and fondled. Miller and K.W. were both a "little drunk." Verbatim Report of Proceedings (VRP) at 390.

The jury convicted Miller as charged. The court imposed 16 community custody conditions. On appeal, Miller assigns error to the following seven conditions:

> 2. Pay the costs of crime-related counseling and medical treatment required by **K.W. (DOB: 11/26/1982)**.
> . . .
> 4. Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.

. . .

6. Do not associate with known users or sellers of illegal drugs.

7. Do not possess drug paraphernalia.

8. Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.

. . .

12. Participate in substance abuse treatment as directed by the supervising Community Corrections Officer.

13. Participate in urinalysis, Breathalyzer, polygraph and plethysmograph examinations as directed by the supervising Community Corrections Officer.

DISCUSSION

Miller seeks reversal of seven conditions of community custody. He claims that (1) five of the conditions regarding drugs and alcohol are not crime-related; (2) the order to pay the victim's costs of crime-related counseling and medical treatment is not authorized the community custody statute; and (3) the requirement that he submit to plethysmograph testing at the order of his CCO violates his constitutional rights.

"[I]llegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The "trial court may impose only a sentence [that] is authorized by statute." State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). When determining whether the trial court was authorized to impose a sentence, the appropriate standard of review is de novo. Id. (citing State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318

(2003)).

At the time of Miller's offense, nonpersistent sex offenders were sentenced under former RCW 9.94A.712 (2008). That statute permits a court to include the community custody conditions listed in former RCW 9.94A.700(5) (2008). Under that section, the sentencing court may order one or more of the following conditions:

> (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.

Former RCW 9.94A.700(5). Additionally, the court may order the offender to perform "affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Former RCW 9.94A.712(6)(a)(i).

Drug and Alcohol Conditions

Miller assigns error to five community custody conditions relating to drugs and alcohol. The conditions (1) prohibit him from possessing alcohol or frequenting establishments where alcohol is the chief commodity for sale, (2) prohibit him from possessing drug paraphernalia, (3) order him to enter substance abuse treatment, (4) order him to stay out of drug areas as defined by the CCO, and (5) prohibit him from associating with known users or sellers of

drugs. We consider each condition in turn and conclude that all five are invalid.

First, Miller challenges the parts of condition 4 that prohibit him from possessing alcohol or frequenting establishments where alcohol is the chief commodity for sale and condition 7 which prohibits him from possessing drug paraphernalia.[1] The State argues that the conditions are crime-related under former RCW 9.94A.700(5)(e). We disagree. A crime-related prohibition is an order that prohibits "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." Former RCW 9.94A.030(13) (2008). Prohibited conduct "need not be causally related to the crime." State v. Letourneau, 100 Wn. App. 424, 432, 997 P.2d 436 (2000) (citing State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992)). The only evidence the State cites in support of its claim that the prohibited conduct is directly related to the circumstances of the rape is Miller's testimony that when he and K.W. kissed a few days before the rape they were both a "little drunk." VRP at 390. But there is no evidence that either Miller or K.W. were consuming illegal drugs or alcohol when the rape occurred. Thus, there is no direct relationship between the circumstances of the crime and illegal drugs or Miller's use of alcohol.

The State further argues that the conditions qualify as "affirmative conduct" conditions under former RCW 9.94A.712(6)(a)(i), in that they aid the prohibition against alcohol consumption. We disagree. First, we note that the conditions are not "affirmative conduct" conditions at all since they do not require

[1] Miller concedes that the court was authorized to prohibit him from consuming alcohol.

Miller to engage in any particular activity. Instead they are simply prohibitions against specific conduct. But even so, nothing in former RCW 9.94A.712(6)(a)(i) authorizes the court to impose community custody conditions solely for the purpose of aiding compliance with other conditions. Instead, an "affirmative conduct" condition must "reasonably relate[ ] to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Former RCW 9.94A.712(6)(a)(i). Here, neither alcohol nor illegal drugs were related to the circumstances of the rape. Nor is there anything in the record to indicate alcohol or illegal drug use increases Miller's risk of reoffending or harming the community. Accordingly, we conclude that the court lacked authority to impose condition 7 and also that portion of condition 4 which prohibits possession of alcohol and frequenting establishments where alcohol is the primary commodity.

Regarding condition 12, which orders Miller to enter substance abuse treatment, the State argues that the court may order an offender to enter crime-related treatment or counseling services under former RCW 9.94A.700(5)(c). But again, because the record does not establish any relationship between substance abuse and the rape, the court was without authority to impose this condition.

Next, Miller challenges conditions 6 and 8, which prohibit him, respectively, from associating with known users or sellers of illegal drugs and from being in drug areas as defined by his CCO. He argues that the conditions are an improper infringement on his rights of association and to travel because

there is no evidence that his offense was drug-related. Appellant's Br. at 9-10. The State responds that former RCW 9.94.700(5) authorizes the court to impose these prohibitions because Miller has not shown that "the constitution protects a right to associate with known users and sellers of illegal drugs []" and because drug areas are "specified geographic areas" from which Miller may lawfully be excluded. Respondent's Br. at 9-10.

We reject the State's arguments. Generally, there should be a relationship between a defendant's crime and special community placement conditions imposed by the sentencing court. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), overruled on other grounds, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). In Riles, petitioner Gholston was convicted of raping a 19 year old woman. The court imposed a community placement condition that prohibited him from contacting minor children. The Court concluded that the condition was impermissible. In reaching this conclusion, the Court reasoned that special community placement conditions generally require some relation with the crime:

> Although there is no express requirement under RCW 9.94A.120(9)(c) that the special conditions be crime-related, a reading of its subsections indicates that five of the six conditions are in fact crime-related. Only subsection four (iv), which states the "offender shall not consume alcohol," is not inherently crime-related. RCW 9.94A.120(9)(c)(ii) gives courts authority to order offenders to have no contact with victims or a "specified class of individuals." The "specified class of individuals" seems in context to require some relationship to the crime.

Riles, 135 Wn.2d at 349-50. Although the SRA permits a court to infringe upon

some of a defendant's constitutional rights during community placement, a "defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order." Id. at 350. This required the State to show that Gholston's rape of a 19 year old indicated that he posed a particular risk to minors. Because the State failed to do so, the restraint upon Gholston's freedom of association did not bear a reasonable relationship to the State's essential needs and public order and the community placement condition was not justified.

The reasoning of Riles is applicable here.[2] Like the condition in Riles, condition 8 implicates one of Miller's fundamental liberty interests—his right to travel. Thus, the State must show that the condition is reasonably related to the State's essential needs and public order, i.e. that the condition is reasonably related to some risk associated with Miller's rape conviction.

The State concedes that the conditions are not crime-related but generally asserts that the conditions are authorized by former RCW 9.94A.700(5). The State argues that under subsection (a), "[d]rug areas defined in writing by the supervising [CCO] are specified geographic areas[]" from which a defendant may be properly excluded. Respondent's at Br. 10. In support of this proposition, the State cites State v. White, 76 Wn. App. 801, 888 P.2d 169 (1995). In White, the court concluded that the "geographical boundary" provision of former RCW 9.94A.120(8)(c)(i) (1994) authorized the sentencing court to

[2] Former RCW 9.94A.120(8)(c) is the predecessor of former RCW 9.94A.700(5). The statutes are identical except that former RCW 9.94A.120(8)(c) contains an additional condition regarding offenders convicted of a felony sex offense against a minor.

impose a community placement condition ordering the defendant to stay out of drug areas. But in that case, because the defendant was convicted of possession of cocaine with intent to deliver, the condition was reasonably related to risks associated with the crime. Id. at 811. Here, the State fails to show that restraining Miller's right to travel is reasonably related to a risk associated with his rape conviction. Thus, we conclude that condition 8 is invalid.

Likewise with condition 6. Although, former RCW 9.94A.700(5)(b) authorized a court to restrict the persons with whom a defendant may associate, the State has made no showing of how the restriction imposed in this case serves to minimizes any risk associated with Miller's crime. The trial court erred by imposing this condition.

Costs of Counseling and Medical Treatment

Miller contends that the trial court was not authorized to impose a community custody condition ordering him to pay the costs of K.W.'s counseling and medical expenses. The State responds that the language of the judgment and the sentence "impliedly limits the condition of payment for the cost of crime related counseling and medical treatment to such costs ordered by the court." Respondent's Br. at 6. We agree with Miller.

A sentence must be authorized by statute. Barnett, 139 Wn.2d at 464. RCW 9.94A.753(3) authorizes the court to order restitution of the costs associated with a victim's crime-related counseling and medical treatment. But

payment of restitution is not a condition of community custody that is authorized by former RCW 9.94A.700.

The trial court entered a restitution order for $346.37. Miller concedes that the court was authorized to enter the restitution order under RCW 9.94A.753. The court also required that Miller "[p]ay the costs of crime-related counseling and medical treatment required by K.W." as a condition of community custody. Clerk's Papers (CP) at 30. The community custody statute, however, does not authorize a condition ordering the payment of counseling or medical treatment costs. The State argues that the judgment and sentence "impliedly limits the condition of payment for the cost of crime related counseling and medical treatment to such costs ordered by the court." Respondent's Br. at 6. But even if we accept this argument, the State fails to establish that the court was authorized to order Miller to pay as a condition of community custody. Thus, we conclude that Miller cannot be required to pay the cost of crime-related counseling or medical treatment as a community custody condition.

Plethysmograph Testing

Plethysmograph testing does not serve a monitoring purpose. Riles, 135 Wn.2d at 345. But it is useful in a treatment context. Thus, a court may not "order plethysmograph testing without also imposing crime-related treatment which reasonably would rely upon plethysmograph testing as a physiological assessment measure." Id.

Miller claims condition 13 violates his constitutional rights to be free from

bodily intrusion and privacy. Miller contends that the plethysmograph testing condition "is not directed at the diagnosis and treatment for sexual deviancy" for two reasons. Appellant's Br. at 14. First, the condition orders Miller to undergo testing at the direction of the CCO. Miller argues that the CCO is not a treatment provider and therefore cannot order plethysmograph testing for treatment. Second, the condition also orders participation in urinalysis, breathalyzer, and polygraph examinations, all of which are monitoring tests. Miller argues that the plethysmograph testing will be done for monitoring compliance and therefore violates his constitutional rights.

The State responds that condition 13 must be read together with condition 10, which orders Miller to participate in sexual deviancy treatment.[3] Reading the two conditions together, the State concludes that the CCO may only order plethysmograph testing in the context of the sexual deviancy treatment.

We read community custody conditions as a whole. State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000). In the present case, condition 10 requires Miller to participate in sexual deviancy evaluation and treatment. Condition 13 requires him to submit to plethysmograph testing at the direction of the CCO. In Riles, the Court approved a substantially similar community placement condition, requiring petitioner Gholston to submit to plethysmograph testing at the order of his treatment provider or CCO. The condition in Riles was:

[3] Condition 10: "Participate in sexual deviancy evaluation and comply w/ any/all recommended treatment with a certified provider and make progress in any recommended course of treatment. Follow all conditions outlined in your treatment contract. Do not change therapists without advanced permission of the Indeterminate Sentence Review Board." CP at 30.

> (4) *Submit to polygraph and plethysmograph testing* upon the request of your therapist and/or Community Corrections Officer, at your own expense.

135 Wn.2d at 337. In both the present case and Riles, separate community custody conditions ordered the defendant to participate in sexual deviancy treatment and submit to plethysmograph testing at the direction of the CCO. In both cases, the plethysmograph testing condition also ordered the defendant to submit to monitoring tests. Accordingly, we conclude that condition 13 is permissible provided that, plethysmograph testing is ordered only for treatment purposes in conjunction with sexual deviancy treatment.

We remand with directions to strike community custody conditions 2, 6, 7, 8, 12, and those portions of condition 4 that prohibit Miller from possessing alcohol or frequenting establishments where alcohol is the primary commodity for sale. We otherwise affirm.

Specimen A.C.J.

WE CONCUR:

Dwyer, J.

Ellington, J.