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Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 61203-4

Title of Case: State Of Washington, Resp. vs. Tony Lee Wilford, App.

File Date: 02/09/2009

SOURCE OF APPEAL

Appeal from King County Superior Court

Docket No: 05-1-09956-5

Judgment or order under review

Date filed: 01/17/2008

Judge signing: Honorable Douglas D Mcbroom

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 61203-4-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
TONY LEE WILFORD,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: February 9, 2009
)	

PER CURIAM -- Tony Wilford appeals a condition of community custody imposed by the Department of Corrections (DOC) that prohibits him from consuming alcohol. He contends that because the trial court did not affirmatively order this condition in the judgment and sentence, the DOC acted contrary to the court's order and therefore lacked authority to impose the condition. Because the judgment and sentence was silent on this condition, did not specify that the DOC could not impose this condition, and authorized the DOC to impose additional conditions not listed in the judgment and sentence, the DOC did not act "contrary to" the court's order and was authorized to impose the condition based on community safety considerations.

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FACTS

Tony Wilford pled guilty as charged to one count of felony violation of a no-contact order -- domestic violence. The trial court sentenced him to 27 months' confinement. The court also imposed a community custody term of 9 to 18 months, as required by statute.¹

The sentencing hearing occurred on October 13, 2005. A victim advocate appeared on behalf of Bonnie Heden, the victim in the case, and stated that Heden wanted "the message conveyed to the court and to Mr. Wilford that he needs to take control of his alcohol abuse." The advocate also told the court that when Wilford was permitted to retrieve his belongings from Heden's apartment in the presence of an

officer, he entered her apartment before the officer arrived and was intoxicated at the time.

Wilford asked that the court not impose an alcohol evaluation, any alcohol treatment, or any "DOC-imposed conditions" on the judgment and sentence. The court initially stated that it would order an alcohol evaluation, referring to the allegations about Wilford being intoxicated during the civil escort to retrieve his belongings. But when Wilford asserted that there were no allegations of alcohol use during the charged incident, the court asked the prosecutor if the State was asking for an alcohol evaluation. The prosecutor responded that it was not and the court stated: "Okay. Then scratch it. We don't need to hear about it [anymore]." Wilford then asked again if the court would consider ordering that he not be subject to any DOC-imposed

1 See RCW 9.94A.715(1); RCW 9.94A.850; RCW 9.94A.411(2).

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conditions. In response, the State asked that the "DOC be authorized to do what they normally do on a case to empower them to do their jobs correctly." The court did not grant Wilford's request, but simply indicated it was signing "appendix H" to the judgment and sentence.

Appendix H set forth the conditions of community custody. The first section of appendix H listed eight conditions authorized by RCW 9.94A.700(4)(5). The next section of appendix H listed "Other Special Conditions" with a box in front of each condition to be checked by the court. One of the conditions was "[t]he defendant shall not consume any alcohol." Only one of the boxes was checked, and that was for the condition stating, "[t]he defendant shall participate in the following crime-related treatment or counseling services." But "N/A" was written beside the box and other words written in under the condition were scratched out. Appendix H further stated:

Other conditions may be imposed by the court or Department during community custody.

. . . The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency.

While Wilford was on community custody, the DOC imposed a condition prohibiting him from consuming alcohol. The DOC found that he violated the condition six times and sanctioned him with a total of 200 days' confinement. According to his community corrections officer (CCO), one of those times the portable breath test reading for his blood alcohol content was .35, which required medical attention. Another time, Wilford reported to his CCO in the morning with a breath test reading of

.190 blood alcohol content.

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In January 2008, Wilford appeared before the court, arguing that the DOC was not authorized to impose the condition prohibiting him from consuming alcohol because it was contrary to the court's order. Wilford asserted that at sentencing, the court declined to order an alcohol evaluation or treatment and that the DOC's condition ran contrary to this. The CCO appeared at the hearing and told the court that Wilford was not sanctioned for failure to comply with an alcohol evaluation, but for violating the condition that he not consume alcohol. The CCO asserted that this condition was imposed based on the risk to community safety and referred to Wilford's "long history of alcohol abuse," and the fact that the "history of assault goes back 20 years with the same victim who is afraid of him."

The State argued that while the court did specify at the time of sentencing that it was not ordering an alcohol evaluation, there was no order that prohibited the DOC from imposing a condition that Wilford not consume alcohol. Rather, the prosecutor noted that the court's order was silent on that condition. Thus, the State argued, the DOC acted within its authority when it later imposed that condition based on the risk to the community as permitted by statute. The court agreed with the State, ruled that the DOC had authority to impose the condition, and denied Wilford's motion to remove the condition. The court made its ruling without prejudice, indicating that if Wilford had more persuasive legal argument on the issue, it would reconsider.

In June 2008, Wilford appeared again before the court and moved to lift the condition prohibiting his use of alcohol. Wilford presented the court with "Appendix H" that was attached to his judgment and sentence and argued that because the court did

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not check the box for the condition prohibiting alcohol use, the DOC was not authorized to impose that condition, citing RCW 9.94A.715.2 The State argued that the statute only prohibits DOC from imposing conditions "contrary to" the court's order and that while the court's order did not impose the condition, it did not order that DOC could not impose that condition. The court ultimately denied Wilford's motion to remove the condition and issued the following ruling:

This Court concludes that because it was silent on the matter of alcohol abstention and because the alcohol abstention condition was based on the public safety (RCW 9.94A.715(2)(b)) and was not contrary to a condition imposed by the Court, the DOC was acting within its

authority in imposing the alcohol abstention.

DISCUSSION

Wilford contends, as he did in the trial court, that the DOC was not authorized to impose the condition prohibiting alcohol use because the court did not order this condition and it was therefore contrary to the trial court's order. We disagree.

A defendant who commits the crime of felony violation of a no-contact order must be sentenced to 9 to 18 months' community custody.³ The conditions of community custody listed in RCW 9.94A.700(4) will automatically be imposed unless the trial court waives the conditions.⁴ The court may also order additional conditions listed in RCW 9.94A.700(5), which includes the condition prohibiting alcohol consumption.⁵

2 Subsection (2)(c) of that statute provides that the DOC "may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions." RCW 9.94A.715(2)(c).

3 RCW 9.94A.715(1); RCW 9.94A.850; RCW 9.94A.411(2).

4 RCW 9.94A.715(2)(a).

5 RCW 9.94A.700(5).

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The DOC supervises offenders on community custody.⁶ The DOC "shall assess the offender's risk of reoffense" and may also "establish and modify additional conditions of the offender's community custody based upon the risk to community safety."⁷ But the DOC "may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions."⁸

Wilford relies on *In re Personal Restraint of Capello*, where this court held that the DOC lacked authority to impose an optional condition when the trial court declined to order that condition.⁹ There, the DOC's presentence report recommended that the court impose a condition of community placement that the defendant's living arrangement and employment was subject to the supervising CCO's approval, but the court declined to impose the condition.¹⁰ When the defendant was eligible for release, the DOC required him to provide a preapproved address as a condition of his release to community custody.¹¹ This court held that by doing so, the DOC exceeded its authority because the record "clearly indicate[d] that the trial court considered and rejected" a condition that would not be imposed unless the court specifically exercised its discretion to do so.¹²

But here the record is clear that the trial court did not specifically consider and reject the condition. This condition was not addressed by either party or the court at the sentencing hearing. The only condition discussed was ordering an alcohol

6 RCW 9.94A.720(1)(a).

7 RCW 9.94A.715(2)(b).

8 RCW 9.94A.715(2)(c).

9 106 Wn. App. 576, 24 P.3d 1074, review denied, 145 Wn.2d 1006 (2001).

10 Id. at 579.

11 Id. at 580.

12 Id. at 585.

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evaluation and follow up treatment, which as the court acknowledged, is not the same as ordering abstention from alcohol. The court's failure to check the box for the condition prohibiting alcohol use does not automatically amount to an order prohibiting the DOC from later imposing that condition, as Wilford suggests. Rather, appendix H of Wilford's judgment and sentence also states: "Other conditions may be imposed by the court or Department during community custody." And the DOC is authorized by statute to "establish and modify additional conditions of the offender's community custody based upon the risk to community safety."¹³ While Wilford specifically requested that the court order that he not be subject to any DOC-imposed conditions, the court refused to do so. Instead, the court signed appendix H, which permitted the DOC to impose additional conditions, and did not otherwise specify that DOC was prohibited from imposing the condition requiring alcohol abstention. Additionally, the court itself later clarified its intent by ruling that its order was merely "silent" on the condition and the DOC's later imposition of the condition was not contrary to the court's judgment and sentence. The trial court properly ruled that DOC had authority to impose the condition.

We affirm.

For the Court:

13 RCW 9.94A.715(2)(b).

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