[Cite as *State v. Lacey*, 2009-Ohio-6267.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23261
vs.	:	T.C. CASE NO. 08CR4287
JOHN E. LACEY	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . . .

O P I N I O N

Rendered on the 25th day of November, 2009.

. . . . . .

Mathias H. Heck, Jr., Pros. Attorney; Melissa M. Ford, Asst. Pros. Attorney, Atty. Reg. No.0084215, P.O. Box 972, Dayton, OH 45422
Attorneys for Plaintiff-Appellee

Victor A. Hodge, Atty. Reg. No. 0007298, Asst. Public Defender, 117 S. Main Street, Suite 400, Dayton, OH 45422
Attorney for Defendant-Appellant

. . . . . .

GRADY, J.:

{¶ 1} Defendant, John E. Lacey, pled guilty to burglary, R.C. 2911.12(A)(3), and improperly furnishing a firearm to a minor, R.C. 2923.21(A)(3). The offenses arose from an incident in which Lacey, age eighteen, and a friend, who was then sixteen, broke into Lacey's father's bedroom and stole a gun and ammunition.

They then took the gun outside and fired it into the air.

{¶ 2} The trial court sentenced Lacey to a term of community control of up to five years. One of the community control conditions the court imposed was that Lacey "have no contact with any non-relative under the age of eighteen." When Defendant asked the trial court at sentencing for a clarification of that condition, the following exchange took place:

{¶ 3} "MR. HODGE: Judge, may we ask for clarification on the no contact, person under 18. That eliminates fast food jobs, that eliminates going to church, going shopping. It's almost impossible.

{¶ 4} "THE COURT: Right now, it's no contact with a non relative under 18. And the court would be – that's something you can work with the probation officer, if we can modify it in some way. You can make exceptions, exceptions can me made if he has a job, that sort of situation.

{¶ 5} "So, I'm amenable to modifying that but not at this point. I'm not just going to, on the spur of the moment, modify that language, so, that is something I would be amenable to. That's something that your client can talk to the probation officer to make exceptions here and there." (Sentence, T. 6-7).

{¶ 6} Defendant filed a notice of appeal from the sentence the court imposed.

ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED BY IMPOSING, AS A CONDITION OF COMMUNITY CONTROL, A REQUIREMENT THAT APPELLANT HAVE NO CONTACT WITH ANY NON-RELATIVE UNDER EIGHTEEN."

{¶ 8} Former R.C. 2951.02(C) authorized sentencing courts to impose conditions of probation "[i]n the interests of doing justice, rehabilitating the offender, and insuring his good behavior." In *State v. Jones* (1990), 49 Ohio St.3d 51, 52 the Supreme Court held that "the courts' discretion in imposing conditions of probation is not limitless," observing that "[s]uch conditions cannot be overly broad so as to unnecessarily impinge upon the probationer's liberty." Further, "[i]n determining whether a condition of probation is related to the interests of doing justice, rehabilitating the offender, and insuring his good behavior, courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory end of probation." *Id.* at 53. (Internal citations omitted).

{¶ 9} In *Jones*, a defendant who had been convicted of five counts of contributing to the unruliness or delinquency of a minor was granted probation. Among the terms of his probation was that

the defendant "have no association or communication, direct or indirect, with anyone under the age of eighteen (18) years not a member of his immediate family." The Supreme Court rejected Jones's contention that the condition was unduly broad, stating:

{¶ 10} "In the present case the condition of probation relating to the association and communication with minors was reasonably related to rehabilitating Jones, without being unduly restrictive. Moreover, the condition, rationally interpreted, relates to the crime of which Jones was convicted, namely, contributing to the unruliness or delinquency of a child. Although the condition does not directly relate to conduct which is in itself criminal, it does reasonably relate to future criminality and serves the statutory ends of probation.

{¶ 11} "The condition of probation questioned here appears to us to be capable of being readily understood. A 'commonsense' reading of the condition provides Jones with fair notice of what conduct is prohibited. See *Nitz,*[1] *supra.* Reasoning in the same manner as the court in *Nitz,* we conclude that the words, 'have no association or communication, direct or indirect, with anyone under the age of eighteen (18) years not a member of his immediate family,' should reasonably be interpreted as meaning an illicit, or potentially unlawful association or communication." *Id.* at

---

[1]***Nitz v. State*** **(Alaska App. 1987), 745 P.2d 1379.**

55-56.

{¶ 12} R.C. 2951.02 and the authority it conferred to impose probation was subsequently repealed. In its place, R.C. 2929.15, a part of S.B. 2 which became effective in 1996, authorizes imposition of community control conditions when that form of sanction is available. Division (A)(1) of R.C. 2929.15 permits the court to impose any sanction "that the court considers appropriate." That section, unlike former R.C. 2951.02(C), establishes no standard to guide the court concerning an "appropriate" sanction. Nevertheless, the tests for reasonableness of a sanction are those announced in *Jones* regarding reasonableness of a condition of probation. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888.

{¶ 13} In *State v. Craft*, Greene App. No. 2001-CA0128, 2002-Ohio-5127, this court applied the holding of *Jones* in construing a condition of community control that defendant "have no contact with any juvenile females under the age of eighteen unless an adult who is aware of defendant's history of sexual behavior and has been approved as a safeguard by defendant's probation officer is present." That condition was imposed by the trial court upon a defendant convicted of gross sexual imposition involving a female under age thirteen. We found that the "no contact" language was overbroad because it could include

unintended, or chance encounters with a juvenile, rather than more meaningful encounters. However, we concluded that this condition of community control would be valid per *Jones* if the language was modified from "no contact" to "no association or communication, direct or indirect, . . ."

{¶ 14} In the present case, as in *Craft*, the "no contact" condition is unduly broad, by prohibiting unintended, chance, and fleeting encounters with a juvenile that have no nexus with criminal conduct, for example of the kind described to the trial court by Defendant's counsel. The liberty interest on which the holding in *Jones* was based is protected by the due process clause of the Fourteenth Amendment. That protection entitles a person bound by a community control condition to reasonable notice of what he must avoid. It also requires the court to fashion a condition with a degree of specificity sufficient to guide a probation officer charged by R.C. 2929.15(A)(2)(b) to report any violation of a condition to the court. A failure to do that is not remedied or avoided by delegating to a probation officer the power to decide whether a particular contact violated or could violate a condition, as the court did in the present case. Prohibiting "associations" instead of "contacts" provides adequate guidance to both.

{¶ 15} The assignment of error is sustained. The condition of community control ordered by the trial court providing that

Defendant-Appellant "have no contact with any non-relative under the age of eighteen" will be modified to provide that he "have no association with any non-relative under the age of eighteen." As modified, the judgment of the trial court will be affirmed.

DONOVAN, P.J. And FAIN, J. concur.

Copies mailed to:

Melissa M. Ford, Esq.
Victor A. Hodge, Esq.
Hon. Dennis J. Langer