Michael K. Jeanes, Clerk of Court
*** Filed ***
11/09/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000328-001 DT 11/02/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA WEBSTER CRAIG JONES

v.

SHU JING XU (001) CARI M MCCONEGHY-NOLAN

MESA MUNICIPAL COURT - COURT ADMINISTRATOR
MESA MUNICIPAL COURT - PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2011–019669.

Defendant-Appellant Shu Jing Xu (Defendant) was convicted in Mesa Municipal Court of prostitution and certain city code violations. Defendant contends the trial court erred in denying her a jury trial and imposing as a condition of probation that she not work in a massage parlor. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 8, 2011, Defendant was cited for prostitution and certain city code violations. Prior to trial, the trial court asked whether Defendant was entitled to a jury trial on any of the charges, and the prosecutor said that none was a jury-eligible offense. (R.T. of Aug. 9, 2011, at 7.) Defendant's attorney said the prostitution charge would be the one at issue. (*Id.*) The trial court said it did not think prostitution was a jury-eligible offense. (*Id.*)

At the conclusion of the testimony, the trial court found Defendant guilty of prostitution. (R.T. of Aug. 9, 2011, at 85.) The trial court took under advisement the other charges, and later found Defendant guilty of those charges. (R.T. of Sep. 6, 2011, at 87.) The trial court placed Defendant on 36 months of unsupervised probation, and included as a condition of probation that she not work in any massage parlor. (*Id.* at 89–90.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Was Defendant entitled to a jury trial on the prostitution charge.*

Defendant contends she was entitled to a jury trial on the prostitution charge. Under Arizona law, a defendant is entitled to a jury trial if the offense was the same as or similar to an offense under common law for which the defendant was entitled to a jury trial. *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 9–10, 36–37, 40 (2005). Prostitution was not, however, an indictable offense at common law. *Bailey v. United States*, 98 F.2d 306, 308 (D.C. Cir. 1938); *accord, State v. Lindsey*, 77 Hawaii 162, 166, 883 P.2d 83, 87 (1994); *McNeil v. State*, 356 Md. 396, 406–07, 739 A.2d 80, 86 (1999); *Matthews v. State*, 68 Md. App. 282, 298, 511 A.2d 548, 556 (1986). *See also State v. Allen*, 2 Conn. Cir. Ct. 594, 597, 203 A.2d 248, 249 (1964); *Prout v. State*, 311 Md. 348, 365 n.8, 535 A.2d 445, 453 n.8 (Ct. App. 1988); *People v. Bailey*, 105 Misc. 2d 772, 773, 432 N.Y.S.2d 789, 791 (N.Y. Crim. Ct. 1980); *State v. Custer*, 65 N.C. 339, 339 (1871); *State v. Grimes*, 88 Or. App. 159, 163 n.5, 735 P.2d 1277, 1279 n.5 (1987); *Commonwealth v. Lavery*, 247 Pa. 139, 143, 93 A. 276, 278 (1915). Because prostitution was not an indictable offense at common law, Defendant was not entitled to a jury trial for that offense.

B. *Did the trial court have the authority to impose as a condition of probation that Defendant not work in a massage parlor.*

Defendant contends the trial court did not have the authority to impose as a condition of probation that Defendant not work in a massage parlor. In *State v. Nickerson*, 164 Ariz. 121, 791 P.3d 647 (Ct. App. 1990), the court rejected Defendant's contention that the trial court erred in imposing as a condition of probation that he have no contact with his wife (his codefendant) without the written consent of his probation officer:

> Appellant contends that the trial court committed reversible error by imposing the additional condition that he not have contact with his wife without the written permission of his probation officer, arguing that the condition results in a violation of his fundamental right to privacy in his marital relations and is not reasonably related to his rehabilitation. He contends that strict scrutiny is required when determining whether the conditions of probation are constitutionally permissible where the condition impinges on a fundamental right and that the condition here does not withstand such scrutiny, particularly because there are less restrictive alternatives.
>
> . . . .
>
> Nor do we find that, as appellant contends, the imposition of the condition constituted fundamental error which may not be waived. In *State v. Montgomery*, our supreme court held that the fact that a probation condition amounts to a restriction on the defendant's privacy does not necessarily render the condition unconstitutional. . . . Thus, where a condition impinges on but does not violate the defendant's fundamental rights, the condition may still be constitutional.

> The condition in this case is not an unconstitutional violation of appellant's right to privacy. Appellant and his wife are both required to attend counseling and they will, therefore, be permitted to interact with one another, albeit it in a controlled environment. By requiring that they seek the probation officer's consent before having personal contact, defined by the trial court as "being in the physical presence of your spouse," the contact will also be controlled, a goal which the record reveals is reasonable under the circumstances.
>
> Finally, the record amply supports the trial court's apparent conclusion that separating appellant and his wife for a period of time and limiting their contact to counseling sessions, telephone conversations, and visits within the discretion of the probation officer, serves a rehabilitative purpose. As discussed above, appellant's trial counsel conceded at the disposition hearing that separation of the two was beneficial to appellant's rehabilitation. We find no fundamental error in the imposition of this condition.

164 Ariz. at 122–23, 791 P.3d at 648–49. This Court finds no constitutional distinction between the right to be with one's spouse and the right to work at a particular job. This Court therefore concludes it was within the trial court's authority to impose as a condition of probation that Defendant not work in a massage parlor.

III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant was not entitled to a jury trial, and further concludes the trial court was within its authority to impose the condition of probation.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

110820120900