No. 43568-3-II
(Consolidated cases)

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SWENSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald Culpepper (trial) and the Honorables Edmund Murphy, Vicki Hogan and Katherine Stolz (motions), Judges

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OPENING BRIEF OF APPELLANT SWENSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL AND OTHER STATE CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing irrelevant, highly prejudicial evidence that appellant Jeffrey Swenson possessed adult pornography protected under the First Amendment.

2. The addendum to the search warrant under which the evidence was seized was invalid and unconstitutionally overbroad, resulting in violation of the First Amendment and Article I, § 5 rights of appellant Jeffrey Swenson.

Swenson assigns error to "Reasons for Admissibility of the Evidence" III of the lower court's Findings of Fact and Conclusions of Law: Defendant's Second Motion to Suppress (Findings 2), which provides as follows:

> Here, the search warrant addendum describes with sufficient particularity the items to be seized and searched because it references the particular crime being investigated by the statute, namely "Possession of Child Pornography, RCW 9.68.080."

CP 145.

Swenson also assigns error to "Reason" IV, in which the court concluded "that the search warrant addendum contains sufficient probable cause and is not overbroad." CP 145-46.

3. The warrant was not based upon sufficient probable cause.

Appellant assigns error to the trial court's findings / declarations that the informant was a "reliable citizen informant," as follows:

In the Court's Written Decision Re: Suppression Hearing (Suppression Decision), that "the court finds that Ms. Westfall was a citizen informant" and "[t]he information contained within the complaint for [the] search warrant showed that Ms. Westfall was a reliable informant" (Decision at 1-3);[1]

In the Findings and Conclusions on Admissibility of Evidence CrR 3.6 (Findings 1), "Conclusions of Law" 1, that "the informant meets both the basis of knowledge and

[1] A supplemental designation of clerk's papers for this document is being filed herewith.

the reliability prongs," Conclusion 4, "[r]egarding the informant's reliability, the court finds that Ms. Westfall was a citizen informant" and that "[t]he information contained within the affidavit in support of the search warrant showed that Westfall was a reliable informant" (Findings 1 at 5-6);[2]

In Findings 2, at CP 143 (the request was based on a tip from "reliable citizen informant Kellie Westfall"); CP 144 (the addendum request was based in part on the "tip from reliable citizen informant Kelli Westfall").

4. Condition 13 of conditions of community custody listed in Appendix H of the Judgment and Sentence contains requirements which are not statutorily authorized and must be stricken.

Condition 13 provides as follows:

> You shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances without a valid prescription from a licensed physician.

CP 198.

5. Condition 27 of conditions of community custody listed in Appendix H of the Judgment and Sentence contains requirements which are not statutorily authorized and must be stricken.

Condition 27 provides as follows:

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 199.

6. Pursuant to RAP 10.1(g), appellant adopts and incorporates herein by reference the arguments of Mark Besola, Swenson's codefendant on appeal, including the relevant assignments of error.

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[2]A supplemental designation of clerk's papers for this document is being filed herewith.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Swenson was on trial for allegedly possessing and dealing in depictions of a minor engaged in sexually explicit activity.

   At trial, over defense objection, Swenson's codefendant, Besola, was allowed to introduce evidence that Swenson possessed and traded adult pornography with another man.

   Besola then argued that Swenson was guilty and should be convicted based on his "proclivity" to commit the charged crimes as evidenced by his possession and use of adult pornography.

   Did the trial court err in admitting the evidence of Swenson's possession/use of adult pornography where that evidence was completely irrelevant, highly prejudicial and invited the jury to penalize Swenson for having possessed items protected by his First Amendment rights?

2. Was the search warrant addendum unconstitutionally overbroad when it authorized the seizure of materials presumptively protected by the First Amendment without limiting the seizure to specific items or providing particularity as required?

3. The informant whose statements to police led to the issuance of the initial warrant in this case was someone who knew both men involved, strongly disliked one of them, had been kicked out of the house in question, had been arrested for and admitted to crimes of dishonesty, and gave her statements as part of a deal where she was allowed to enter drug court.

   Did the trial court err in finding that the informant was a "citizen informant" and not requiring any corroboration of her claims prior to the issuance of the warrant?

4. A sentencing court may only impose conditions of community custody which are authorized by the Legislature. While the Legislature has authorized the imposition of a condition prohibiting the possession or use of any controlled substance without a lawful prescription, it has not limited the medical personnel from whom such a prescription can be received.

   Did the sentencing court err and was the condition limiting Swenson to possessing only items based upon the

prescription issued by a "licensed physician" unauthorized?

5. Is a condition of community custody unconstitutionally vague where it allows a treatment provider to define the prohibition, directly affects First Amendment rights in a way irrelevant to the crimes and fails to provide sufficient standards to prevent arbitrary enforcement and give sufficient notice of what it prohibits?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jeffrey Swenson was charged by amended information filed in Pierce County with one count of dealing in depictions of a minor engaged in sexually explicit conduct and one count of possessing depictions of a minor engaged in sexually explicit conduct. CP 155-56; RCW 9.68A.050(1); RCW 9.68A.070. Also charged as a co-defendant was Mark Besola. See CP 130.

Pretrial proceedings were held before the Honorable Judge Edmund Murphy on October 19, 2010, and November 30, 2011, the Honorable Judge Vicki Hogan on February 2, 2012, and the Honorable Judge Katherine Stolz, also on February 2, 2012.[3]

Further pretrial proceedings and trial were held before the Honorable Judge Ronald Culpepper on April 9-12, 16-19, 2012, after

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[3]There are 12 volumes of actual transcript and three two-page printed indications of no proceedings on the record (11/12/10, 2/16/11, 6/8/11). The actual transcripts will be referred to as follows:

the volume containing both the proceedings of October 19, 2010, and November 30, 2011, as "1RP;"
February 2, 2012 (morning), as "2RP;"
February 2, 2012 (afternoon), as "3RP;"
the eight chronologically-paginated volumes containing the proceedings of April 9, 10, 11, 12, 16, 17, 18 and 19, 2012, as "4RP;"
the sentencing proceedings of June 8, 2012, as "SRP."

which a jury found Swenson guilty as charged. CP 157-58.

At sentencing on June 8, 2012, Judge Culpepper ordered Swenson to serve a standard-range sentence for each offense. CP 175-94. Swenson appealed and this pleading follows. See CP 200.

2. Overview of relevant facts[4]

After she was arrested and charged with multiple crimes, while still in custody, Kellie Westfall gave police information about a man named Mark Besola and another man who lived with Besola, Jeffrey Swenson. CP 251-53. Westfall claimed to have seen Besola abusing drugs from his veterinary practice and said she had seen child pornography at Besola's home. Id. She also claimed she had both sold to and bought drugs from Besola.

As a result of Westfall's claims, police sought search warrants for Besola's home, asking to be authorized to look both for drugs and for child pornography. CP 307. The authorizing judge denied the request to search for child pornography but authorized a search for drugs. CP 307. Multiple officers then went to the home to serve the search warrant, opening and searching CD and DVD covers and saying it was because drugs could possibly be found anywhere, including there. 4RP 365-82.

One officer thought the titles of some of the disks might indicate "pornography," and the police were therefore working on getting an addendum to the search warrant for the purposes of seizing the DVDs and CDs when Besola and Swenson arrived home. 1RP 54. An officer who

[4]Additional details on relevant facts are contained in the argument section, *infra*, or are adopted pursuant to RAP 10.1(g) as indicated herein, in relation to relevant issues.

spoke to him said that Swenson had said there were disks with child pornography on them inside the house, and that he showed officers where it could be found. The resulting warrant addendum allowed officers to seize all CDs, DVDs, VHS tapes, "pornographic materials," photos of anyone, and computers or memory storage devices in the home.

The upstairs of the house was cluttered, and throughout there were "things laying around everywhere," including clothes, boxes, "CDs" and "DVDs." 4RP 362-65. CDs or DVDs were found behind a water heater in the attached bathroom, in a suitcase in the master bedroom, in the nightstands on both sides of the bed, and elsewhere in the house, which was very large. 4RP 370-72.

Multiple officers watched the huge number of CDs and DVDs taken from the home, over several days, cataloguing their contents. 4RP 832. Only 41 disks were found to contain suspected child pornography, and much of it was the same depictions just copied onto different disks. 4RP 832.

One officer noted that, out of about 168 disks he viewed, only four disks had suspected child pornography. 4RP 712-713. Another officer looked at 306 CDs/DVDs and found only two with suspected child pornography. 4RP 756.

Of the disks the officers thought had suspected child pornography, a forensic scientist with the Washington State Patrol crime lab testified that it was Besola's handwriting on one "homemade" disk. 4RP 426-27. The scientist found 20+ other items that had "indications" they were in Besola's writing but Bishop gave only a "qualified opinion" that Besola

had written them, saying the evidence was not definitive. 4RP 427.

The scientist also testified that Swenson's writing appeared to be on one homemade disk and there were "indications" of his handwriting on another 4 or so disks. 4RP 444, 455-56. Again, however, the scientist qualified his "indications" finding, admitting that, when he said there was an "indication" of Swenson's writing on a few disks, that was "really more or less saying maybe it might be their writing, but we're not sure." RP 462.

On the computer in the downstairs area of the home were about four files which were described as including juveniles having sex with adults. 4RP 774-77. Also found on the computer were some links in the registry to files with names such as one stating a seven-year-old was portrayed, but the content of those files had been deleted and officers did not verify to what content those links might have previously led. 4RP 774-77.

That computer had a username for Besola but not specifically for Swenson. 4RP 770. Officers also found documents, banking records, business records and other items on the computer which appeared to belong to Besola or his business. 4RP 770. Nothing similar was found on the computer for Swenson. 4RP 770.

A sex offender who lived on the property testified (over defense objection) that he "swapped" pornography with Swenson about once a week. 4RP 875. The offender admitted it was never child pornography and that he had no idea whether any of the disks he had seen in the home involved children or not because the titles were often misleading in porn.

4RP 867.

D. ARGUMENT

1. IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE WAS IMPROPERLY ADMITTED AND THE ERROR COMPELS REVERSAL

Constitutionally protected behavior cannot be the basis for criminal punishment. State v. Rupe, 101 Wn.2d 664, 704, 683 P.2d 571 (1984). Indeed, due process is violated if there is an impermissible use of protected behavior at trial. State v. Luther, 157 Wn.2d 63, 75-76, 134 P.3d 205, cert. denied sub nom Luther v. Washington, 549 U.S. 978 (2006).

In this case, this Court should reverse, because the trial court erred in admitting evidence of Swenson's having engaged in constitutionally protected behavior. Further, that evidence was used against him to argue his guilt at trial, in violation of Swenson's due process and First Amendment rights.

a. Relevant facts

Before trial, counsel for Besola told the court that he was intending to call Brent Waller as a witness. 4RP 342. The attorney told the court that Waller, a sex offender who lives above Besola's garage, was going to testify that he and Swenson were "swapping pornography back and forth all the time" and that Swenson had tried to give him some child porn but Waller had declined. 4RP 342. Besola's attorney said the evidence was "highly relevant to show that the **proclivity** for this is not Dr. Besola, that it's Mr. Swenson." 4RP 342 (emphasis added). At that point, the court

wanted to move forward with calling jurors, so it did not discuss the issue further. 4RP 343.

In opening statement, the prosecutor told the jury that officers "found all kinds of pornography throughout the house, and some of it did appear that it could be child pornography." 4RP 347.

Later, when the parties were discussing the expected testimony for their cases, counsel for Swenson expressed his concerns "that we will get into character assassination of Mr. Swenson" when Besola was presenting his case. 4RP 813. At that point, Besola's attorney said that Waller was going to testify that "Mr. Swenson exchanged child pornography with him, that Mr. Swenson, they had a deal where they were swapping pornography back and forth." 4RP 815. Besola's attorney said this showed "he has the proclivity for the child pornography." 4RP 816.

Both counsel and the prosecutor objected that the evidence was irrelevant. 4RP 816. The court responded that, "if he was swapping child pornography with Mr. Waller, I suppose that's relevant." 4RP 816. Ultimately, counsel for Besola clarified that Swenson and Waller were not "swapping child pornography" but that Swenson tried to show Waller some child porn and Waller said it was not his "thing." 4RP 819. The court ruled that the evidence was relevant. 4RP 819.

In his opening argument, counsel for Besola described Besola as "nurturing," a caretaker and basically a victim of Swenson's activities. 4RP 843-44. Besola's theory was that "the child pornography belonged to Mr. Swenson, and it's very easy to prove because Mr. Swenson is the one who had a proclivity for child pornography." 4RP 844. This was based on

the anticipated testimony from Waller "that he swapped pornography with Mr. Swenson and had concerns about what Mr. Swenson's likes and dislikes were." 4RP 844.

After the conclusion of the state's case, Besola then presented testimony from Waller in which the following exchange occurred:

> Q: What type of mutual interest did you share with Mr. Swenson?
>
> A: Well, we traded porn.
>
> Q: What type of pornography did you trade with Jeff?
>
> A: I just like straight stuff.
>
> Q: He seemed to like something different?
>
> [SWENSON'S COUNSEL]: Objection; foundation.
>
> THE COURT: Let's get a little foundation.
>
> Q: How often would you swap pornography with Mr. Swenson?
>
> A: Once a week.

4RP 850. Besola's attorney then asked if Waller and Swenson discussed their "likes and dislikes," after which Waller said he told Swenson Waller "didn't like gay stuff" and that Swenson liked "[y]ounger girls or young men with older women." 4RP 851. Besola's attorney asked similar questions about the exchange of DVDs a little later, again and again establishing the "swapping" of pornography happened about once a week. 4RP 861, 864, 866. Besola's attorney also again tried to get into the belief that "Jeff had some different tastes" other than "straight porn." 4RP 864. Over strenuous, repeated objection from counsel, the attorney tried to get Waller to say what he thought was Swenson's "penchant for

pornography,"4RP 865.

In closing argument, counsel for Besola argued that the jury should acquit Besola and find Swenson guilty of possessing and duplicating the child pornography, relying on Swenson's possession and trading of adult pornography:

> CDs, DVDs. Brent Waller, who was in here testifying, who was swapping porn with who here? Brant was swapping porn with Jeff, period. That's what these guys were doing. It's their deal. But the bottom line is, who's passing material back and forth? Brent and Jeff. It's not Mark and Jeff; it's with Brent and Jeff.

4RP 1181. Besola's counsel also declared that the "child pornography" and "images" belonged to Swenson, as evidenced by his possession and trading of the adult pornography:

> [W]ho was burning DVDs? Jeff. Who was burning music? Jeff. **Who has the propensity to do this? Jeff.** Who has all the tie-ins with CDs and DVDs? Jeff. It's not Mark.

4RP 1190 (emphasis added). He closed by reminding the jurors that it was Swenson "that **has the proclivity for this**," then went on:

> Remember, Brent Waller told you that Jeff Swenson was in to [sic] porn. Brent Waller told you he was swapping pornography with Mr. Swenson. You never heard any mention about whether or not Dr. Besola was seen with pornography, and I believe Brent said he would never even ask.
>
> Dr. Besola is not in to [sic] pornography. He knew it was there but respected Jeff's rights. He did not know child pornography was on there, and there's a huge difference between knowing there's adult porn and contraband in your house.

4RP 1192-93 (emphasis added).

b. The evidence was improperly admitted, irrelevant and highly preducial

The admission of this evidence and Besola's use of it to argue that Swenson was guilty and should be convicted violated not only Swenson's due process rights also his First Amendment rights as well. Evidence is only relevant when it has a tendency to make any fact which is of consequence more or less likely. See State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). Further, evidence of other crimes, wrongs or acts is inadmissible to prove the defendant's "character" or "propensity." See ER 404(b); Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed 168, 69 S. Ct. 213 (1948). Such evidence is inadmissible even if relevant because of its likelihood to cause the jury to convict the defendant not for what he was accused of but rather for who they think he *is*. See State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

Here, evidence that Swenson possessed, viewed and traded **adult** pornography was completely irrelevant to anything other than what Besola used it for - to argue Swenson was guilty of the charged crimes because of his "proclivity."

The court faced a similar issue in State v. Coghill, 216 Ariz. 578, 169 P.3d 942 (2008). In that case, a defendant was convicted of crimes involving child pornography. At trial, evidence that he had admitted to possessing, downloading and using adult pornography was admitted. 169 P.3d at 583.

Applying an abuse of discretion standard, the appellate court

reversed. There was no question that evidence showing the ability to download and willingness to do so was relevant, the Court agreed. 169 P.3d at 583. But the "**nature and content**" of the materials (i.e., that it was adult porn) were "irrelevant to any of those proper purposes." 169 P.3d at 583 (emphasis in original).

The Coghill Court also rejected the idea that "adult pornography evidence 'does go to the issue of the defendant's intent'" in relation to child pornography. 169 P.3d at 584. To the extent the trial court "meant to adopt the state's contention at trial that the evidence was relevant to Coghill's intent because a person who downloads adult pornography would be more likely to download child pornography as well," the Court held, that was improper: The Court explained:

> That theory of relevance requires the inference that, because Coghill has the sexual motivation to view and preserve adult pornography, he must have a propensity to do the same with child pornography. Our court has previously observed that "'any distinction (occasionally attempted) between the sexual tendencies of an accused, on the one hand, and his disposition or character, on the other, is spurious. And, Rule 404(b) expressly prohibits the introduction of other-act evidence to "prove the character of a person in order to show action in conformity therewith." Thus, to the extent the court ruled the evidence of adult pornography admissible on the theory that a person who downloads adult pornography would be more prone to download child pornography, we hold it abused its discretion.

169 P.3d at 584-85. The Court concluded that the evidence of Coghill's downloading of adult porn and copying it to disc was not "admissible to show Coghill had a propensity to download child pornography."

The Court was also unconvinced that the error was harmless. Coghill, 169 P.3d at 585-86. The Court specifically rejected the idea that

the "legal and readily accessible nature of adult pornography deprives it of any prejudicial impact" on jurors. Id. Instead, the Court noted, adult pornography can engender in jurors "disgust and antagonism" toward the defendant resulting in "overwhelming prejudice." Id.; see also, United States v. Marcus, 193 F. Supp. 2d 552, 563 (E.D. N.Y. 2001) (adult pornography "irrelevant" in case regarding child pornography). Evidence of adult pornography is inadmissible in child pornography cases, especially where there are no charges involving the adult materials and the defendant "may even have had a right to possess and to view some or all of these X-rated videotapes in his home." United States v. Harvey, 991 F.2d 981, 996 (C.A. 2 N.Y. 1993) (same).

Here, Swenson was not on trial for his lawful possession of adult pornography. The only relevance to introducing the evidence of such pornography was Besola's impermissible purpose of arguing that Swenson should be found guilty of the child pornography charges because he was the type of guy who, by "proclivity," was probably guilty. And the evidence used by Besola to prove that "proclivity" was Swenson's exercise of his First Amendment rights in relation to adult pornography.

The trial court erred in admitting this highly irrelevant evidence over defense objection. This improper use of Swenson's First Amendment rights at the criminal trial at which he was convicted of a crime violated not only those rights but also due process as well. This Court should so hold and should reverse.

2. THE WARRANT ADDENDUM WAS UNCONSTITUTIONALLY OVERBROAD

Pursuant to RAP 10.1(g) and this Court's order of Consolidation, Swenson adopts and incorporates by reference herein all of the arguments on this issue contained in Besola's opening brief. In addition, Swenson submits the following:

a. Additional relevant facts

Swenson's counsel joined in the motion regarding the overbreadth of the language of the affidavit seeking the addendum. 2RP 1-5. That argument included, *inter alia*, that the warrant addendum did not limit itself to child pornography but instead said, "take all printed materials, especially pornography." 2RP 19. Swenson's counsel pointed out that the items the officers saw showed what they believed "were pornographic materials, not child pornographic" and that such materials are "protected." 2RP 21. Besola's counsel pointed out that, because adult pornography was protected, greater "particularity" for a warrant was required. 2RP 34. He also pointed out that it was not a crime to possess adult pornography, rather than that involving a child. 2RP 37.

In denying the defense motion, Judge Hogan found, *inter alia*, that the warrant was not overbroad. 2RP 39-40. The judge declared:

> I recognize the argument being made between the lawful and the unlawful or protected and not protected material. But that's for a different day. As to admissibility or relevance, I agree that there may have been some protected materials, but the statute is there, possession of child pornography, and it's sufficiently particular for the scope of the search that was conducted.

2RP 40.

b. The warrant was overbroad

In addition to the arguments presented by codefendant's counsel, Swenson requests that the Court consider the purposes for requiring sufficient particularity in a warrant.

One purpose of the requirement is to prevent "general searches" in which there is a "general, exploratory rummaging in a person's belongings." See Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (quotations omitted). Further, particularity "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." State v. Perrone, 119 Wn.2d 538, 546, 834 P.2d 611 (1992). In addition, the particularity requirement is "tied to the probable cause determination," preventing warrants "issued on loose, vague, or doubtful bases of fact" and speculation. Id.

Most importantly for this case, the highest Court in this state has recognized that a search warrant authorizing a search for materials which are generally protected by the First Amendment requires greater "particularity," i.e., greater specificity of the "things to be seized." Perrone, 119 Wn.2d at 547-48. This is because "[n]o less a standard could be faithful to First Amendment freedoms." Id, quoting, Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

Further, this Court applies de novo review to the determination of whether a search warrant "contains a sufficiently particularized description." Perrone, 119 Wn.2d at 549.

There is no question that child pornography is not protected by the First Amendment. New York v. Ferber, 458 U.S. 747, 764-65, 102 S. Ct.

3348, 73 L. Ed.2d 1113 (1982). As the Supreme Court held in Perrone, however, the fact that officers are searching for child pornography does not excuse the state from meeting the heightened particularity requirements which apply to any warrant for "[b]ooks, films and the like." Perrone, 119 Wn.2d at 551. Our highest court declared:

> [w]hile the [U.S. Supreme] Court held that child pornography is not protected by the First Amendment, that is not to say that any search warrant having as its object the seizure of child pornography escapes the mandate that the particularity requirement be followed with "scrupulous exactitude." Books, films, and the like are **presumptively** protected by the First Amendment where their content is the basis for seizure. . . the fact that child pornography is not protected by the First Amendment is irrelevant in addressing the particularity requirement.

Perrone, 119 Wn.2d at 550 (emphasis in original).

Thus, here, the fact that the officers were seeking evidence that Swenson and Besola had child pornography did not render the extremely overbroad language in the warrant addendum proper. That language permitted the police to seize not just evidence which could be construed as child pornography but First Amendment protected material, to wit:

1. Any and all videotapes, CDs, DVDs, or any other visual and or audio recordings;

2. Any and all printed pornographic materials;

3. Any photographs, but particularly of minors;

4. Any and all computer hard drives or laptop computers and any memory storage devices; [and]

5. Any and all documents demonstrating purchase, sale or transfer of pornographic material[.]

CP 313.

The First Amendment protects the rights of citizens to possess, in

their own home, even obscenity which is not child pornography. See Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). Indeed, "mere private possession of obscene matter cannot constitutionally be made a crime," because citizens have the right to receive information and ideas "regardless of their social worth." 394 U.S. at 559. This principle is not just important; it is "fundamental to our free society." Id. Because it allowed seizure of materials presumptively protected by the First Amendment, the addendum to the warrant was required to be very particular in the authority it granted the state. It was not. The resulting evidence should have been suppressed, and this Court should so hold and should reverse.

3. THE ISSUING MAGISTRATE ERRED IN GRANTING THE INITIAL WARRANT AND THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THAT WARRANT

Pursuant to RAP 10.1(g) and this Court's order of Consolidation, Swenson adopts and incorporates by reference herein all of the arguments on this issue contained in Besola's opening brief. In addition, Swenson submits the following:

Swenson joined in Besola's motions to suppress. 1RP 4, 14-16; CP 130. Regarding the issue of the reliability of the informant, Swenson submits the following argument in addition to that presented in Besola's opening brief:

The trial court's decision that Westfall was somehow a "citizen informant" appeared to place great weight upon the fact that Westfall gave her name. But "[a]lthough the necessary showing of reliability may be

relaxed when a citizen informant furnishes information, that information must still support an inference that he or she is telling the truth" and has a sufficient basis of knowledge. State v. Franklin, 49 Wn. App. 106, 109, 741 P.2d 83, review denied, 109 Wn.2d 1018 (1987).

Further, a "citizen informant" is supposed to be "an innocent victim or uninvolved witness to criminal activity" - not someone like Westfall whose bias and self-interest hardly made her "uninvolved." See State v. Rodriguez, 53 Wn. App. 571, 576, 769 P.2d 309 (1989).

In addition, the fact that Westfall's statements included minor admissions against her penal interest did not, by definition, make her an unbiased, impartial "citizen informant." Her statements told police that Besola had bought drugs "from. . .through. . . and for" Westfall. But she had already been arrested for drugs and was going to be going to drug court.

The idea that a person who makes a statement against penal interest must be telling the truth because they have potentially incriminated themselves, however, ignores important facts. Someone making such a statement "could have decided that some other interest is more important than his or her penal interest." Mary Nicol Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity,* 40 N.M. L. Rev. 225, 239-40 (2010). Another possibility is that the speaker is saying something self-incriminating "while giving the police a significant quantity of information against someone else," either to get revenge or because doing so will actually further her penal interest. Id. Put another way, "when a speaker prioritizes some other interest ahead

of her penal interest, the theory for the reliability of the statement against interest no longer applies." Id.

Westfall was not an unbiased citizen informant. She was a woman in custody, charged with multiple offenses, trying to get accepted into drug court, giving police information incriminating others to do so. The facts that she used her name, or that she gave a vague admission to selling and using drugs while already facing proceedings in a drug case, or even that she was not paid to give the statement, do not erase the self-interest and bias she had or give her sufficient reliability so that the police were allowed to act on her information without any corroboration at all. The trial court erred in finding that Westfall was a "citizen informant" and this Court should so hold.

4. TWO CONDITIONS OF COMMUNITY CUSTODY WERE NOT STATUTORILY AUTHORIZED AND/OR VIOLATED DUE PROCESS AND MUST BE STRICKEN

A sentencing court does not enjoy unfettered discretion in sentencing and is only permitted to impose conditions of sentencing which are authorized by the law. See State v. Kolsenik, 146 Wn. App. 790, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). For this reason, although conditions of community custody or placement are usually reviewed for abuse of discretion, such an abuse will be found where the sentencing court exceeds its statutory authority and imposes a condition which is not authorized by law. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). And where, as here, the lower court acts outside its statutory authority in imposing improper conditions of community placement or custody, the issue can be raised for the first time on appeal.

See State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

Put another way, the Supreme Court has held, where the lower court imposes an illegal or erroneous condition at sentencing, that condition may be challenged for the first time on appeal even though the challenge is "preenforcement" because it is occurring before community placement or custody occurs. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Where the challenge raises primarily a legal question and no further factual development is required, the Bahl Court held, the reviewing court will address it on direct appeal, rather than waiting to see how the unlawful condition is used by the state in practice later. Id.

In this case, the sentencing court abused its discretion and violated due process by ordering conditions 13 and 27 of community custody/placement. First, condition 13 was not authorized. That condition provides as follows, "[y]ou shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances **without a valid prescription from a licensed physician.**" CP 198 (emphasis added).

The emphasized part of this condition was not authorized by law. Under RCW 9.94A.703(2), one of the conditions a sentencing court may choose to impose or waive is the requirement that an offender "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions[.]" RCW 9.94A.703(2)(c).

But nothing in the statute authorized the court to limit the medical personnel from whom Mr. Swenson was allowed to get a prescription to

only physicians. Osteopaths, optometrists, dentists, podiatrists and certain physicians assistants and nurse practitioners are all authorized by our Legislature to lawfully issue prescriptions in this state. See, e.g., RCW 69.41.030(1). It is to be assumed that the Legislature was aware of its own statute on who can issue "lawful prescriptions" when it wrote the condition on "lawful prescriptions" in RCW 9.94A.703(2)(c). See Wright v. Miller, 93 Wn. App. 189, 197-98, 963 P.2d 934 (1998). Yet the Legislature did not choose to limit prescriptions for those subject to the condition to only those issued by a physician.

Thus, while the sentencing court was authorized to decide whether to limit Swenson to possessing controlled substances only when he has a lawfully issued prescription, the court did not have the authority to override the Legislative decision to choose to allow all persons on community custody/placement the same medical access as other people, i.e., to get prescriptions from those the Legislature authorized to write them.

Condition 27 was also not statutorily authorized and was, in fact, unconstitutionally vague. A condition of vague and in violation of due process under the state and federal constitutions if the condition is either not defined with sufficient "definiteness" so that an ordinary person could determine what conduct was prohibited, or if the condition "does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005).

Condition 27 suffered from both of those defects and was in large

part not crime-related, as well. The condition provided, as follows:

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 199.

Bahl, supra, and Sansone, supra, are instructive. In Bahl, the relevant condition prohibited the defendant from "possessing or accessing" pornographic materials, "a directed by the supervising Community Corrections Officer." 164 Wn.2d at 754. In finding the condition unconstitutionally vague, the Supreme Court noted that, by delegating to the CCO what falls under the condition. the condition "virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement." 164 Wn.2d at 758.

Similarly, in Sansone, where a condition mandated that the defendant not possess or peruse pornographic materials without prior approval, leaving what constituted "pornography" to be "defined by the therapist and/or Community Corrections Officer." 127 Wn. App. at 634-35. The vagueness of the condition was not only shown by the use of the term "pornography," a general, expansive term but also by the delegation to the therapist/DOC to define what amounts to "pornography." 127 Wn. App. at 639. The condition was unconstitutionally vague because it created "a real danger that the prohibition on pornography will ultimately translate to a prohibition on whatever the officer personally finds" offensive, even if it is not legally pornography. Id.

Here, condition 27 suffers from similar infirmities. It does not

limit itself to prohibiting "crime-related" behavior, such as possession of child pornography. Instead, the condition prohibits Mr. Swenson from possessing or seeing "**any** sexually explicit materials in any medium," regardless whether it is legal, adult pornography unrelated to the crime. Further, it leaves it up to the sexual deviancy treatment provider to define for Swenson "sexually explicit material," without limiting that definition to material involving children alone.

But where a condition of community custody or placement infringes upon a fundamental right such as those protected under the First Amendment, the condition must be "clear. . . and. . . reasonably necessary to accomplish essential state needs and public order." See Bahl, 164 Wn.2d at 758.

Further, the condition prohibits Swenson from going to "establishments that promote the commercialization of sex," without defining exactly which "establishments" Swenson must avoid. Is a bar a place which "promote[s] the commercialization of sex" when it is laden with photos, etc., of buxom models posing with alcohol in a way designed to use sex to sell? How is Swenson to know where he is supposed to avoid?

Nor could this be seen as a "crime-related" prohibition. To be "crime-related," a prohibition must be related to the circumstances of the crime. See State v. Autrey, 136 Wn. App. 460 , 466, 150 P.3d 580 (2006). There is absolutely no evidence that going to a bar or other places which can be subjectively deemed to "promote the commercialization of sex" had

anything to do with the crimes in this case. Nor did the state present any evidence to show that possessing "sexually explicit material" involving *adults* - activity protected by the First Amendment - was in way related to the crime of possessing child pornography. Where, as here, the state seeks to preclude a defendant from engaging in lawful, constitutionally protected activity, it must meet greater requirements for specificity in order to be narrowly tailored to serve an important governmental interest. Bahl, 164 Wn.2d at 757-58.

Both condition 13 and condition 27 should be stricken.

5. PURSUANT TO RAP 10.1(g), SWENSON ADOPTS AND INCORPORATES BY REFERENCE HEREIN ALL OF THE REMAINING ARGUMENTS PRESENTED IN CODEFENDANT BESOLA'S BRIEFING

RAP 10.1(g) provides that, in cases such as this, parties may adopt and incorporate by reference arguments of parties similarly situated. The purpose of the rule is "to facilitate shared briefing related to shared issues," in part to reduce waste of scarce judicial resources. See C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 728 n. 18, 985 P.2d 262 (1999). Pursuant to RAP 10.1(g) and this Court's Order of Consolidation in June of 2012, Mr. Swenson adopts and incorporates by reference all of the arguments presented in the opening brief on appeal filed by Besola, which are relevant to Swenson. More specifically, the arguments challenging the jury instruction, challenging the warrant as invalid based on material misrepresentations and reckless omissions, the "same criminal conduct" and other arguments as indicated herein are adopted pursuant to RAP 10.1(g).

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Swenson the relief to which he is entitled.

DATED this 28th day of February, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to the relevant parties, as follows: by first-class mail, postage prepaid, to Kathleen Proctor, Pierce County Prosecutor's Officer, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; codefendant counsel: Suzanne Lee Elliot, Hoge Building, 705 2nd Ave. Suite 1300, Seattle, Wa. 98104-1797, and to Jeffrey Swenson, DOC 861561, Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 28th day of February, 2013.

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

STATE OF WASHINGTON, Respondent,	)	No. 43568-3-II
	)	ERRATA
v.	)	
JEFFREY SWENSON, Appellant.	)	

COMES NOW the appellant, by and through counsel, Kathryn Russell Selk, and upon all the files, records and proceedings herein, and submits the following Errata in relation to two citations in his opening brief on appeal, to be corrected as follows:

On page 1, Assignment of Error three, third paragraph: citation to "Decision at 1-3," including footnote 1, please delete and replace with CP 3-6.

On page 2, Assignment of Error three, continuation of fourth paragraph: citation to "Findings at 5-6" and footnote 2, please delete and replace with CP 11-13.

DATED this 5th day of March, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING AND MAILING:

I, the undersigned, hereby declare under penalty of perjury under the laws of the state of Washington that I delivered a true and correct copy of the attached document to counsel for the codefendant, Suzanne Elliiot, and opposing counsel via this Court's portal upload at the following addresses: Suzanne-elliot@msn.com, pcpatcecf@co.pierce.wa.us, and to appellant, as follows: by first class postage-prepaid, at the following address: Jeffrey Swenson, DOC 861561, Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 5th day of March, 2013.

Signed:

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